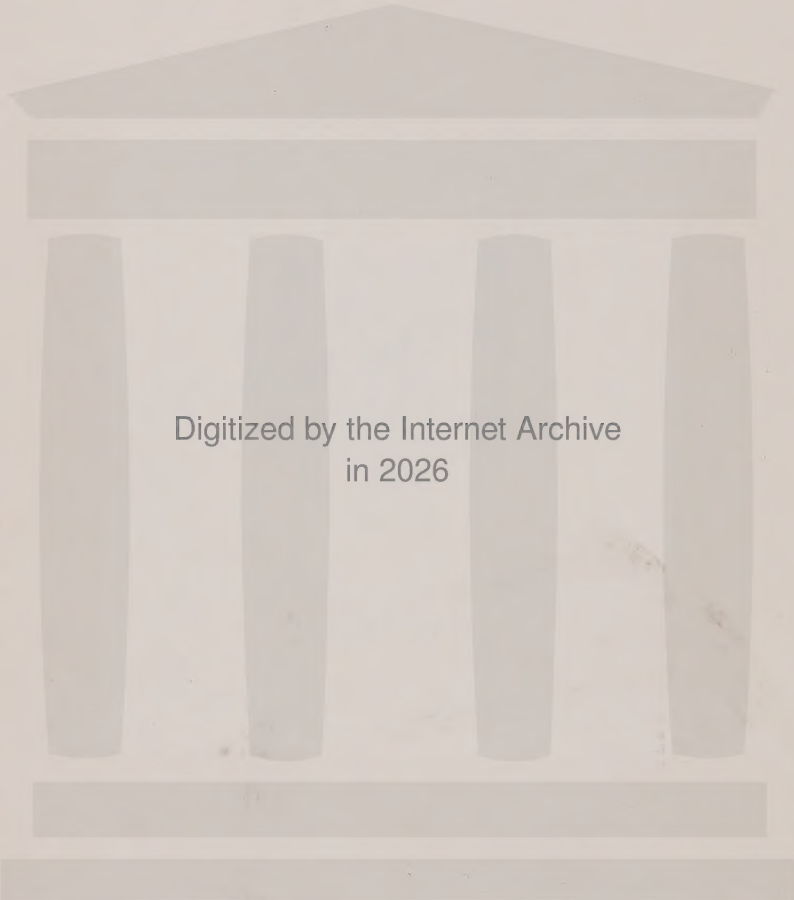




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THE CAMBRIDGE LAW JOURNAL 1972

JUBILEE ISSUE
AND INDEX

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JUBILEE ISSUE

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PREFACE

It is with great pleasure that we present on behalf of the *Cambridge Law Journal* this special issue to commemorate its fiftieth anniversary. We would like to express our deep appreciation of the co-operation of the contributors, all Cambridge men, who so willingly devoted their time and energies not only towards producing the essays themselves, but also in helping to minimise the labour of seeing them through the press.

It is obviously appropriate that we should begin the issue with an account of the origin of the *Journal*, and we are particularly glad to be able to place on record Professor Hollond's personal recollections of its earliest stirrings, as well as the account by Professor Goodhart, our first editor, of the launching of the first volume. Thereafter the subject-matter is arranged so as to give pride of place to Roman Law by virtue of its age and universality, to be followed by International Law and Conflict of Laws as coming next in universality. Turning to the national scene, they are followed by Legal History, Land Law, Torts, Criminal Law, Contract and Family Law and the collection ends on a more general note with Constitutional Law and Jurisprudence. With regard to the choice of subjects, we can only say that it proved impossible to include all that we would have wished. Except in the cases of the first two contributions, the other authors were asked to take some development or event in their various subjects, which occurred within the fifty-year period, and to weave their papers around that. These essays are the result and we feel privileged to have been able to act as editors.

R. W. M. D.
D. G. T. W.

March 1972

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THE ORIGIN OF THE LAW JOURNAL

INTRODUCTORY NOTE

H. A. HOLLOND

It may be of interest if, after the lapse of fifty years, I record my memories, now dim, of the birth of the *Cambridge Law Journal* in 1921. Credit for the initiation of the venture belongs to the Committee of the Cambridge University Law Society, an undergraduate club founded in January 1901. In the academic year 1920-21 I was treasurer of the society and the junior officers were A. T. Harries of Emmanuel, R. Branston of Christ's, R. M. Hughes of Downing, and T. Simpson Pedler of Queens'. This group came to see me and propounded the proposal that the society should publish an annual magazine. T. S. Pedler was the most active spokesman, and I have always regarded him as the ultimate founder of the *Journal*. The original idea of the group was to publish a magazine containing an account of the doings of the society and of other matters relating to the law school in general. My contribution to the venture was to persuade the officers that if the society was to have a magazine it should be a scholarly production edited by a law don and embodying some of the features of the *Harvard Law Review*.

After this policy had been approved I persuaded Arthur L. Goodhart, who had been my pupil at Trinity in 1912-13, and was then law don at Corpus, to undertake the editorship. His decision was a momentous one. He made the project feasible by undertaking its support financially until it was securely on its legs, and he set a high standard which subsequent editors have consistently lived up to. And the external repercussions were far-reaching. His experience and success in the editorship of the *Cambridge Law Journal* made him the obvious person to succeed to the editorship of the *Law Quarterly Review* in 1925 when A. E. Randall died all too soon at the age of 63. Goodhart's editorship of the *Law Quarterly Review* during a period of over forty years is one of the significant features of English legal history in the present century.

It may be of interest to take a look at the first number of the *Cambridge Law Journal*. Its character was much more domestic than is that of its successors at the present time. There were, as at present, articles by eminent lawyers. Those in the first number were by Lord Justice Scrutton, Professor J. H. Beale of the Harvard

Law School, Ernest Pollock (afterwards Lord Hanworth), Samuel Garrett (a President of the Law Society), and the great legal historian T. F. T. Plucknett. This list needs no comment. There follows a section of notes on recent cases. The plan of the founders, which I still think has great merit, was that the notes should be written by junior members of the law school and revised by a senior member. Many of the notes in the first number were contributed by E. C. S. Wade, now Emeritus Professor. Then followed a section of reports of University and College law societies. This is of some historical interest as showing how active the junior members of the law schools were fifty years ago. And lastly there were twenty pages of book reviews, nearly all written by members of the staff of the law school. This was very much smaller than it is now, for many Colleges had no law Fellow.

With the growth of the law school the *Cambridge Law Journal* has grown too and has lost something of its domestic character. But it may fairly be said that it had a worthy beginning, and that those responsible for its present impressive successor have every reason to be grateful to Arthur Goodhart for the foundations which he so well and truly laid.

THE ORIGIN OF THE JOURNAL

A. L. GOODHART

HENRY HOLLOND, who was the Director of Legal Studies at Trinity College, Cambridge, when I came there in the autumn of 1912 after graduating from Yale University, went to the Harvard Law School as a visitor during the academic year 1913 to 1914. When he returned to England in time to join the British Army he said that there were two things at Harvard which had particularly impressed him.

The first thing was the case system which was a supreme example of the Socratic method of teaching. The discussions between the professor and the students forced both of them to be mentally alert at full stretch during the whole session and to concentrate on the point at issue: there could be no vague thinking. As a result the students tended to work harder week by week than those at Cambridge, and were not satisfied to concentrate their efforts on the last term before the final examinations.

The second thing that impressed him was the *Harvard Law Review* which was edited solely by the student-editors. There was

nothing similar to this at any British university. It was the ambition of all the ablest students at Harvard to be elected to the *Review* as it constituted an open sesame to employment, with a future partnership in view, by the leading American law firms where the work was extremely hard but lucrative.

After the war had ended Hollond returned to Trinity and I was offered a Fellowship at Corpus Christi College. It was then that we discussed the possibility of introducing at the Cambridge law school something resembling the case system in place of the English essay system which is based on a weekly essay on a subject set by the law tutor and which is thereafter discussed with him. It soon became clear that the case method would not, for many reasons, fit into the British system of education in which so much emphasis is placed on training the student to put his ideas in writing. Hollond, however, persuaded the Law Board to support the creation of seminars in addition to the established lectures so that the student could be trained to argue orally as well as to write. Since then many of the English law schools have followed the Cambridge example in adding seminars to their regular curriculum.

It was Hollond's enthusiasm for the *Harvard Law Review* which, I believe, has borne particularly useful fruit. At first sight the prospect of a University law review at Cambridge seemed to be extremely dim. The aim of the *Harvard Law Review*, which was established two years after the *Law Quarterly Review* had been founded in England in 1883 by Sir Frederick Pollock and a small group of Oxford law teachers, was to follow the latter's example by publishing material of a more scholarly quality than appeared in the essentially practical journals. There was not, therefore, the same need in England for an academic publication, as the *Law Quarterly Review* had this aim in view.

Hollond recognised the force of this criticism, but he felt that there were other grounds on which a Cambridge law journal would be of value to the school if the students could be persuaded to undertake this extra work. It would not, of course, have the same material advantages that an editorship of the *Harvard Law Review* gives to a holder because it would not be of help to a prospective barrister in obtaining a place in the best chambers, nor would it, as the situation existed at that time, be of use to a neophyte solicitor in gaining admission to a leading firm. It was necessary, therefore, to make it clear to the best students that the work itself would be interesting and of value in their professional training. It was then that Hollond asked me to become editor-in-chief because it was thought that, as an American, I would know about American law reviews. This was a fortunate mistake as I had hardly ever read the *Harvard*

Law Review or even looked at any of the notes as I had not been a law student in the United States.

The notes in an American law journal tend to be particularly dour. The tendency is for the author to collect all the precedent cases, of which there are usually a great number, as each state and the Federal courts have independent legal systems so that it is almost always possible to find conflicting views on most points except those that are self-evident. The result is that the author of an American note tends to divide his precedents into two groups, pro and con, and then to determine on which side the balance falls. This is back-breaking work which is not always satisfactory because the reasons on which a result has been based may be more important than the result itself.

When we began the notes in the *Cambridge Law Journal* we adopted a different system. We found that the best way in which to interest the prospective author was to have him state the facts that he thought were relevant, and then for him to suggest what conclusions ought to be reached on them, giving his reasons in some detail. It was surprising to find how often there were only two or three prior cases which were directly in point. There were few notes that required more than four or five citations; if they exceeded that figure then it was likely that the note resembled a digest rather than a reasoned analysis of the principles involved in it.

In 1953, however, the practice of getting students to write case notes was discontinued as it was found that there were not a sufficient number of students who were able or willing to produce notes of a sufficiently high standard to warrant their being published. It must be remembered that at Cambridge most of the students who read law are undergraduates, while in the United States it is almost a universal rule that only students who have already received a university degree can enter a law school.

The second problem with which we were faced when starting our journal was to obtain enough leading articles that were of general interest. Most of those we received tended to be a textbook "writ small." A fortunate accident led us in another direction. When Viscount Haldane, the former Lord Chancellor, accepted an invitation to address the Cambridge Law Society, I asked him whether we could publish his address. He replied that he did not intend to prepare a manuscript, but that if we wished to have his talk taken down stenographically, we could use the result after he had corrected it. This address, which we published under the title "The Work for the Empire of the Judicial Committee of the Privy Council" was probably one of the most important and interesting ones that any law journal has ever published as it dealt with matters that could not

be found in the textbooks. Other articles of a similar nature in Volume 1 were: Lord Justice Scrutton's "The Work of the Commercial Courts," Professor Joseph H. Beale's "Equity in America," Sir Ernest Pollock's (the Solicitor-General) "The International Court of the League of Nations" and Dean Roscoe Pound's "The History of Conspiracy and Abuse of Legal Procedure."* The moral of this is that I do not believe that the articles in a law journal need always be of a stock form: it is even possible to publish a poem from time to time.

It is difficult to realise that fifty years have passed since the first number of the *Cambridge Law Journal* was published. It has led what might be called an unadventurous life as its original format has hardly changed, but it has expanded in size as it is now published twice yearly. At the present moment there does not seem to be any reason why further changes should be made. We send it our best wishes for its continuing success.

* [Until 1953 one issue of the Journal was published annually, three issues making up one volume. Viscount Haldane's address and Dean Pound's article appear in the second issue of Volume I in 1922. Since 1954 one volume comprising two issues, appearing in April and November respectively, has been published annually: Editors.]

THE TWO SCHOOLS OF JURISTS IN THE EARLY ROMAN PRINCIPATE

PETER STEIN

THE jurists of the early Principate were divided into two groups, the Proculians and the Sabinians, but the nature of the division has proved to be a perennial problem of Roman legal history. Pomponius tells us that the Proculians regarded Labeo as their founder and the Sabinians Capito, and he gives lists of their respective leaders for more than a century. Furthermore, we know of more than two dozen particular problems which provoked disputes between the two groups.¹ But the sources provide little express evidence as to the underlying opposing principles, if indeed there were any, which were espoused by them. Pomponius says that Labeo and Capito "first made, as it were, two sects: for Ateius Capito held fast to what had been handed down to him, whereas Labeo, a genius, with confidence in his own scholarship, a man who had studied several other branches of knowledge, set out to make many innovations" (D.1.2.2.47). Yet, when the various controversies are considered, the school of Labeo does not seem to champion doctrines which are especially progressive and that of Capito does not seem particularly conservative.

Traditionally the humanist jurists tried to find philosophical criteria for the school differences. A number of essays on this topic were collected in 1724 by Gottlieb Slevogtius of Jena under the title *De sectis et philosophia iurisconsultorum opuscula*. One or two of the disputes are indeed explicable on the basis that the schools adopted opposing philosophical doctrines. The dispute about *specificatio*, the ownership of a thing made by A out of material belonging to B, is the stock example (Gaius, 2.79; D.41.1.7.7, Gaius, 2 *rer. cottid.*).² The Sabinians, who attributed ownership to B, adopted the Stoic doctrine that the essence of a thing was the substance of which it was made, whereas the Proculians, who gave the thing to A, followed the Aristotelian doctrine that what made a thing a thing was its form. But such philosophical explanations have no general

¹ Conveniently listed in H. J. Roby, *Introduction to the Study of Justinian's Digest* (1884), pp. cxxxi-cxli. Cf. also B. Kübler's survey, Pauly-Wissowa, *Real-Encyclopädie*, s.v. Rechtsschulen, I.A. 380-394.

² Sokolowski, *Philosophie im Privatrecht*, I.69; F. De Zulueta, *Digest 41. 1 and 2*, p. 13.

application to the controversies. The jurists did not differ in their approach to life, but only in their approach to law.

More recently some historians have suggested that the two schools adopted contrasting criteria of legal interpretation. But equally unconvincing cases have been made for the proposition that it was the Sabinians who favoured an equitable interpretation and the Proculians who favoured a strict interpretation and for the exactly opposite proposition.

Most modern histories deny the possibility of identifying any substantial doctrinal difference between the schools. Jolowicz³ finds it "necessary to conclude that the difference between the two schools was personal rather than doctrinal" and De Zulueta⁴ comments that "no one has been able to reduce the differences of view to any principle." Such statements take the line of least resistance, and fail to take adequate account of Pomponius' assertion, when describing the origin of the schools, that in law Labeo was an innovator and that Capito was a traditionalist. As we have noted, it is not possible to categorise the legal views of the schools as progressive or conservative. But Pomponius does not specifically say that it was in substantive legal doctrine that Labeo innovated. It is possible that his new ideas were more in the field of legal method and technique. It is the purpose of this paper to test that idea.

I

We are not entitled to assume that a difference of view which may have provided the *raison d'être* for the two opposing schools in the time of their founders necessarily remained constant throughout their existence. For once the two schools became established, their rivalry would engender its own momentum, and they could therefore continue to exist as separate institutions even after the theoretical justification for the original division among the jurists had disappeared. In fact, the evidence, such as it is, supports such an assumption.⁵ Referring to the time of Labeo and Capito, Pomponius speaks of *diversae sectae*. *Sectae* may mean schools of thought, and, with regard to their earlier protagonists, it is *dissensiones*, differences of opinion, which Pomponius emphasises. Gaius, on the other hand, consistently speaks of two *scholae*, as does also the younger Pliny, who refers to Cassius as *Cassianae scholae auctor et princeps* (Ep.7.24.8.). It seems therefore that the differences of opinion go

³ *Historical Introduction to the Study of Roman Law* (2nd ed., 1952), p. 389.

⁴ *The Institutes of Gaius*, II (1953), p. 10.

⁵ A. M. Honoré, *Gaius* (1962), pp. 18-39; for Proculus, Honoré, "Proculus" (1962) 30 *Tijdschrift voor Rechtsgeschiedenis* 489-493, and Chr. Krampe, *Proculi Epistulae, eine frühklassische Juristenschrift* (1970), pp. 1-9; for Cassius, F. d'Ippolito, *Ideologia e diritto in Gaio Cassio Longino* (1969).

back to Labeo and Capito, but as established institutions, whether or not they provided courses of instruction,⁶ the schools were founded by Proculus and Cassius.

So we should concentrate our inquiry on the earlier rather than the later champions of the schools. We have little evidence of Capito's legal opinions or methods, but since Pomponius characterised him as a traditionalist, we may assume that he opposed whatever new methods were introduced by Labeo and preferred the traditional methods of the late Republican jurists. By contrast, we have a good deal of evidence of Labeo's particular opinions.⁷ About 500 of his legal decisions are mentioned in the Digest, and about half of them contain some reasoning or justification of the decision. They show that to a considerable degree he shared the Republican jurists' view of the law and its sources, but in certain significant respects he went further than they did.

The standard list of the sources in which the basis of a legal decision in the late Republic could be found is that of the *Auctor ad Herennium*, 2.10.4, who speaks of *lex*, *mos*, *natura* and *aequum et bonum*. That Labeo initially approached a legal problem by seeking the origin of the relevant law in such sources is demonstrated by a text concerning the *actio aquae pluviae arcendae*, D.39.3.1.23 (Ulpian, 53 *ad edictum*).⁸

Labeo's method is to look first for a *lex* as the source of the relevant law. *Lex* was not confined to the statutory law set out in a *lex publica* of the *comitia*, but in a wider sense covered any authoritative written source for a legal decision.⁹ In this sense it included both public *leges*, in the sense of enactments of the *comitia* or the administrative orders setting out the relationship of different plots when an area of land was first settled, and also private *leges*, such as agreements attached to *mancipationes*, stipulatory promises and testamentary dispositions.¹⁰ The common denominator of all these *leges* was that they provided a fixed text, and so the legal problem resolved itself into an *interpretatio verborum*.

⁶ Discussed by K. M. T. Atkinson, "The Education of the Lawyer in Ancient Rome" (1970) 87 S.A.L.J. 43 *et seq.*

⁷ E. Seidl, *Römische Rechtsgeschichte und Römisches Zivilprozessrecht* (1962), pp. 72-73; Seidl, "Labeos geistiges Profil," *Studi in onore di E. Volterra* (1969), 1.63-81; F. Horak, *Rationes Decidendi*, I (1969), an exhaustive study of the reasons given for their decisions by all jurists up to and including Labeo (*cf.* my review in (1970) 36 *Studia et Documenta Historiae et Iuris* 460-464).

⁸ Discussed in Horak, *op. cit.* pp. 279-280.

⁹ P. Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (1966), pp. 9 *et seq.*; Stein, "The Meaning of *lex publica*," *Studi in onore di E. Volterra* (1969), 2.313-319.

¹⁰ Cicero, *Partitiones Oratoriae*, 37.130: *Scriptorum autem privatum aliud est, publicum aliud. Publicum lex, senatusconsultum, foedus: privatum tabulae, pactum conventum, stipulatio.*

In the instant case,¹¹ Labeo is confronted by a case in which it is alleged that a lower-lying plot of land is subject to another higher plot, and asks first if there is an express grant in favour of the higher plot contained in a *lex agro dicta*. If there were such a grant, that would dispose of the matter conclusively. In the absence of such an authoritative source of law, Labeo looks at the *natura agri*, the circumstances of the relative situation of the plots of land. Such consideration might indicate that, to minimise the inconvenience of geography in the interest of both parties, the lower land must accept water flowing from the higher, and so the owner of the higher land would have the action if some change in the lower land impeded the flow and caused flooding on the higher land. Alternatively, if no *lex* were found, appeal might be made to long use, for, says Labeo, antiquity (*vetustas*) has the force of a *lex*. The language ("found") in this instance suggests that if there was a long-standing practice that the lower plot should receive water from the higher, this should be regarded (fictitiously) as a right imposed by a *lex dicta* which had been lost.¹² The practice had to exceed living memory (*nec memoria extare, quando facta est*, says Labeo of a ditch, D.39.3.2.1.).

Many cases could no doubt be settled by reference to these three sources of *lex*, *natura*, and *vetustas*. Labeo was particularly interested in the problems of *interpretatio verborum*, offered by *leges*, where the decision turned on the meaning given to a text, whether of public or private origin. We know he was interested generally in problems of language and grammar¹³ and this interest seems to have led him to look as far as possible for a precise objective meaning for any set of words which was submitted to him, and to apply that meaning, without regard to whether it represented the subjective intention of the author of the text in question. A number of examples illustrate his reluctance to go beyond the ordinary meaning of the words.

Labeo refused to interpret the word *fugitivus* in the praetor's edict to cover a child born to a female slave who had fled from her owner, as well as the slave herself (D.11.4.1.5, Ulpian, 1 *ad edictum*). He would not extend the meaning of *occidere*, kill, in the *lex Aquilia* to cover the case where someone offered a slave a cup of poison, which the slave then took in his hands and drank (D.9.2.9pr., Ulpian, 18 *ad edictum*). Again, when a testator, who had four goblets of a certain design, bequeathed *pocula paria duo*, *paria* meaning either

¹¹ For discussion of the legal situation, A. Watson, *The Law of Property in the later Roman Republic* (1968), pp. 161 *et seq.*; for *natura agri*, C. A. Maschi, *La concezione naturalistica del diritto e degli istituti giuridici romani* (1937), pp. 27 *et seq.*

¹² Cf. the doctrine of the lost modern grant in the English law of easements.

¹³ Stein, *Regulae Iuris*, p. 63.

the substantive "pairs" or the adjective "similar," Labeo insisted that the legacy was of two similar goblets and not two pairs, since to achieve the latter meaning, the testator should have said either *bina paria*, "both pairs," or *poculorum paria duo*, "two pairs of goblets" (D.32.30pr., Labeo, 2 *post. a lavol. epit.*).

These examples raise problems of *lex*, or as a later jurist¹⁴ called it, *ius quod constat ex scripto*, which was the appropriate field for the application of the rhetorical topic *scriptum-sententia*, letter-spirit.¹⁵ The terms of the rule under discussion might be ambiguous, or it might be unclear whether the rule as stated in those terms covered the facts of the case, but at least there was no argument over the existence of the rule or about its formulation. In cases of doubt, Labeo preferred a literal interpretation. In contracts he placed the emphasis on *quod actum est*, the arrangement as shown by the formulation (D.18.1.77, Javolenus, 4 *ex post. Labeonis*). The author of a statement submitted for interpretation must be assumed to have known the meaning of what he was saying and it was up to him to make his meaning clear. So Labeo interpreted the terms of a contract of sale against the seller who framed it, because, as he explained, the seller could have expressed himself more clearly before the contract was concluded (*quia potuit re integra apertius dicere*, D.18.1.21, Paul, 5 *ad Sabinum*).

As we shall see, however, most of the school disputes were not about *interpretatio verborum* but arose rather from the unwritten law, the *ius quod sine scripto venit compositum a prudentibus* (Pomponius in D.1.2.2.5).¹⁶ This kind of law raised methodological problems quite different from those presented by written law, and it is difficult to resist the impression that the theories which labelled the juristic schools as favouring the letter or the spirit were developed by scholars who instinctively thought of law as written law. No statement of a rule by a jurist has the force of a statement in a *lex* or of a statement in the praetor's edict. In the case of written law there may be doubt about the meaning of the statement but at least its terms are given and beyond dispute. In the case of the unwritten law there is assumed to be a rule but the declaration of the rule by the jurist is merely evidence of its terms. Naturally the more distinguished the jurist, the more authority his statements of the unwritten law possessed. But a statement by a jurist could never have the final

¹⁴ Ulpian, in D.1.1.6.

¹⁵ B. Vonglis, *La lettre et l'esprit de la loi dans la jurisprudence classique et la rhétorique* (1968).

¹⁶ For written and unwritten law in Rome, P. Stein, *Roman Law and English Jurisprudence Yesterday and Today*, inaugural lecture, Cambridge (1969), pp. 16 *et seq.*

given quality in its terms which was enjoyed by a statement in the edict or a *lex*.

Where the case could not be settled by the technique of *interpretatio verborum*, Labeo was ready in the first instance to turn to established practice, and this was especially appropriate in cases involving conflicting property rights, such as that in D.39.3.1.23. In such cases the main purpose of the law is to make clear what vested rights competing land owners have acquired and to protect them. Certainty is all-important. But in other areas, where there is a conflict of interest, appeal to long-established practice is not so obviously relevant, or such practice might not exist. In such cases Labeo exercised his gift for finding the *mot juste* to define certain legal institutions, the limits and scope of which had become blurred in practice.

In this work of definition he made use of techniques developed by the rhetoricians. They held that a definition should have as its object the identification of the essential elements of what was defined. When confronted by a case of *negotiorum gestio*, an unauthorised act on behalf of another, Labeo laid down that if the *gestor* wished to claim his expenses from the principal, the essential point he must show is that his act was *utiliter gestum*, i.e., beneficial to the principal at the time (D.3.5.9.(10).1, Ulpian, 10 *ad edictum*). So also it was Labeo who recognised that the essential feature of the delict of *iniuria*, which marked it off from other kinds of delictual conduct, was *contumelia*, insult (D.47.10.15.46, Ulpian, 57 *ad edictum*). The identification of this characteristic allowed *iniuria* to be marked off from the delict of *damnum iniuria datum*, sanctioned by the *lex Aquilia*, which was the causing of actual financial loss.¹⁷

Labeo was adept at making distinctions which showed when one action applied rather than another and when an action could be brought and when it could not. If the statue of your father, which has been erected on his tomb, has been destroyed by people throwing stones, you cannot bring the *actio sepulchri violati*, he says, but you can sue them by the *actio iniuriarum* (D.47.10.27, Paul, 27 *ad edictum*). When a partner injured himself in trying to stop some slaves belonging to the partnership from running away, Labeo held that he could not claim his medical expenses from the other partners in the *actio pro socio*, because although they were expenses resulting from the partnership (*propter societatem*), they were not expenses incurred for partnership purposes (*in societatem*) (D.17.2.60.1, Pomponius, 13 *ad Sabinum*).

Labeo's method presupposed that beneath the rules of the

¹⁷ R. Martini, *Le definizioni dei giuristi romani* (1966), discusses Labeo's definitions of particular notions, pp. 137-148.

unwritten law, which were waiting to be defined by the jurists, was a sub-structure of rational principles, and it was these rational principles which indicated, in cases of doubt, the limits of the rules themselves.

Up to this point, the only difference between Labeo's methods and those of earlier jurists, is that Labeo carried on the process of defining and distinguishing more rigorously than they and insisted on laying down precisely what they were ready to leave undefined, if it was not necessary for the decision of the cases submitted to them. But Labeo justified his decisions with reasons, and this naturally led him to refer to other cases in which the same reasoning applied.

If one member of a banking partnership makes a pact with a debtor of the partnership, can the *exceptio pacti* be pleaded against the other partner? Labeo says no, and adds "nor can one partner novate the obligation, although payment of the debt can validly be made to him" (D.2.14.27pr., Paul, 3 *ad edictum*). To explain his decision Labeo goes to the basic principle that the character of the obligation can only be altered by all the partners and illustrates it by another example of its implications. Again, if an *infans* does damage he is not liable under the *lex Aquilia*. But, says Labeo, if an *impubes* (i.e., one below the age of puberty but old enough to understand what he was doing) did it, since he is liable for theft, he is also liable to the Aquilian action (D.9.2.5.2, Ulpian, 18 *ad edictum*). The same principle must apply to both delicts; it would be irrational to have different rules for them. This way of thinking involves the use of analogy and that technique Labeo took over from the grammarians.¹⁸

The Greek grammarians had been divided into two schools, the analogists and anomalists. The former considered that language was something inherently orderly, and sought to show that nouns and verbs could be classified into declensions and conjugations on the basis of similarity of form. The opposing school rejected the notion that language was governed by general principles, pointed out that the rules postulated by analogists had a large number of exceptions, and stressed that language was the product of nature and could not be confined within rules. The Latin grammarians were influenced by the controversy between the analogists and anomalists, but the most influential of them, Varro, attempted a compromise between the two positions, pointing out that they were not so far apart as their protagonists believed.¹⁹ Correct speech, said Varro, derived from

¹⁸ Stein, *Regulae Iuris*, pp. 53 *et seq.*; Stein, "The Relations between Grammar and Law in the Early Principate: the beginnings of Analogy," *Atti del II congr. int. della Soc. it. storia del diritto* (1971) pp. 75 *et seq.*

¹⁹ H. Nettleship, "The Study of Latin Grammar among the Romans in the First Century A.D." (1886) 15 *Jo. Philology*, p. 202; for references to more recent studies, R. H. Robins, *A short History of Linguistics* (1969), pp. 19 *et seq.*, 47 *et seq.*

four elements, *natura*, *analogia*, *consuetudo*, *auctoritas*. Varro's classification became established among students of language with only slight modifications. Quintilian, I.6.1, speaks of language as based on *ratio*, or on *vetustas*, *auctoritas* and *consuetudo*. He replaced nature by antiquity and the technical *analogia* by the somewhat wider *ratio*. After Varro it was accepted that where custom was thoroughly established, it must prevail. The argument between the analogists and anomalists was now confined to the area of *dubius sermo*, where usage itself varied. The former held that, where there was doubt, it was the form of expression suggested by analogy which was correct speech.

Labeo is known to have been an analogist in matters of grammar, and Aulus Gellius says expressly (13.10.1) that he used his linguistic expertise to solve knotty problems in law (*ad iuris laqueos enodandos*). He must have noticed the similarity between the lists of the sources of language and those of law, and it was almost certainly he who added *ratio* to the list of sources of law. For the method of analogy became accepted as a regular technique of Roman law in his work. This method presupposes that the law is based on a set of coherent rational principles, but it is only applied in those areas where the relevant rule is in doubt.

If a testator bequeathed merely the use (*usus*) of a piece of land, this was clearly something less than the usufruct. But what did it include? Labeo points out that the beneficiary can live on the land and can exclude the owner from it, but he cannot exclude the owner's tenant or his slaves who are there to cultivate the land. On the other hand the owner's domestic slaves can be excluded on the same principle (*ratio*) as that on which the owner himself can be excluded (D.7.8.10.4, Ulpian, 17 *ad Sabinum*). Again, can the slave of one who is born after my death be instituted as my heir? Labeo holds that he can be instituted, and justifies his decision *manifesto argumento*, by citing the case of a slave belonging to the estate of a deceased person, whose heir has not yet entered on the inheritance. Such a slave could validly be instituted heir in someone else's will, although at the time when the will was made he belonged to no one (D.28.5.65, Javolenus, 7 *epistularum*). Bremer²⁰ cites eleven texts in which Labeo uses analogical argument of this kind.

Analogy not only provided an argument for laying down a new rule deriving from the same principle as an old rule; it also showed the limits of particular actions, and Labeo was rigorous in confining the scope of contractual actions to their proper field. Thus where the owner of goods had contracted with the captain of a ship, but it was

²⁰ *Iurisprudentia Antehadriana* (1898), 2.1.10 *et seq.*

not clear whether he had hired the ship (*conductio rei*) or had entrusted the goods for carriage (*locatio operis*), he refused to allow either the *actio ex conducto* or the *actio ex locato* and gave an *actio in factum*, setting out the special facts and expressing a duty at civil law (D.19.5.1.1, Papinian, 8 *quaestionum*). On the other hand, when there was no such demarcation problem, Labeo was more liberal than his contemporaries. He held, for example, that the residual *actio de dolo* should be allowed not only where there was no other action but also where there existed a doubt whether there was another action or not (*si dubitetur an alia sit*, D.4.3.7.3, Ulpian, 11 *ad edictum*), and thus ensured that the victim of fraud always had a remedy.

Although Labeo made good use of analogy, it was by no means his only form of argument, and he did not use it to excess. It was perhaps its use as an instrument for enunciating new rules derived from established principles, which were implied in the law rather than expressly stated, which encouraged him to think of law in a new way. The experience of the English common law has shown that the conception of the law as unwritten custom can produce two contrasting lines of thought. One is that law is essentially old and unchangeable, the immemorial custom of a particular people, and the other is that law is continually developing to meet new social conditions. His studies of language enabled Labeo to think of law in the second way, as a set of rules, based on a firm foundation of basic principles, but needing to be reformulated to meet changing circumstances.²¹

Later jurists recognised Labeo's emphasis on the need to control the development of the law by the application of rational principles. In one case Javolenus, a Sabinian, says that Labeo's opinion was based on good reason, although legal practice was otherwise (*Labeonis . . . sententia rationem quidem habet, sed hoc iure utimur*, D.40.7.39.4, Javolenus, 4 *ex post. Labeonis*), this neatly pinpointing the respective orientations of the two juristic schools.

II

In the light of these remarks, we turn now to the school disputes themselves.

(a) *Disputes concerning interpretatio verborum*

The only dispute, which appears to turn on the meaning of a statutory provision, is that concerning the number of mancipationes which were necessary to surrender a son noxally to the victim of a

²¹ It was Labeo who transmitted the story of how the introduction of the *actio iniuriarum* was forced on the praetor (because of the inadequacy of the fixed penalties for assault provided by the Twelve Tables), Aulus Gellius, 20.1.13.

delict committed by that son (Gaius, 4.79).²² The Twelve Tables laid down that if a father sold his son three times into bondage to the father's creditor, so that son should work off the father's debt, the father was to lose his paternal power over him. The pontifical lawyers used this rule to make possible the voluntary release of a son from paternal power by means of three successive sales to a friend. It seems to have been agreed by both Proculians and Sabinians that mancipation for the purpose of noxal surrender of the son involved the extinction of paternal power. The only question was whether one mancipation was sufficient or three were needed. The Sabinians held to the former view, on the ground that the Twelve Tables rule applied only to voluntary mancipations, and in practice this was the normal situation in which the rule was applied. The Proculians held that three mancipations were required in the case of noxal surrender just as in others. The only way a son could pass out of paternal power was under the Twelve Tables rule and that rule stipulated three mancipations.

A controversy over the meaning of a phrase in a will is recorded in D.30.26.2 (Pomponius, 5 *ad Sabinum*). If a testator bequeathed part of his goods (*bonorum pars*), Sabinus and Cassius regarded this as a bequest of the designated share of the value of the estate, whereas Proculus and Nerva held that it was a bequest of the designated share of the things themselves. They doubtless argued that there was no obscurity in the words, and, had the testator intended the legatee to have the value of the goods, he could easily have said so.

A controversy over the meaning of words contained in a stipulatory promise is mentioned in D.45.1.138pr. (Venuleius, 4 *stipulationum*). If a man promised that something should be paid on the days of a specified market (*certarum nundinarum diebus dari*), Sabinus held that his creditor could claim it on the first day of the market. Proculus and other (unnamed) Proculians considered that the claim could not be made until the market was entirely finished. Only then was the debtor in default. Similarly Sabinus held that a stipulated penalty for non-performance of a promise could be claimed as soon as performance was possible, whereas Pegasus, a Proculian, maintained that the creditor had to wait until performance was impossible (D.45.1.115.2, Papinian, 2 *quaestionum*). The problem would only arise where the promise was carelessly drafted and the Proculians, following Labeo, properly construed its terms against the creditor who had drafted it.

²² F. De Visscher, *Le régime romain de la noxalité* (1947), pp. 295–297; R. Yaron, "Si pater filium ter venum duit" (1968) 36 *Tijdschrift voor Rechtsgeschiedenis* 59, n. 8.

Another controversy over the effect of a stipulatory promise is recorded in Gaius, 3.103. If a man stipulates for himself and for Titius (who is not in his family), it was agreed that he could confer no enforceable benefit on Titius; nothing could be due to him (*inutilis est stipulatio*), since he was not a party to the contract. But what was due to the stipulator himself? The Sabinians answered that the whole was due to him, just as if he had not added Titius' name. The Proculians replied that, since the part of the stipulation referring to Titius' half was void, only half could be due to the stipulator.

We have seen that the Proculians took a similar view in cases of statute, testament and stipulatory promise. Their consistency in all questions of *interpretatio verborum* is confirmed by their attitude to the words of the *formulae* of actions. Gaius, 4.114, records a dispute over the effect of a payment by the defendant to the plaintiff after joinder of issue in the action, when the terms of the *formula* were settled, and before judgment. The Sabinians held that the *iudex* could in every case absolve the defendant, because all actions admit of absolution (*omnia iudicia sunt absolutoria*), presumably at all stages. The Proculians agreed where the action was *bonae fidei*, because the *ex bona fide* clause in the *formula* empowered the *iudex* to absolve, if he thought it right to do so; similarly in actions *in rem*, where the *formula* contained a *clausula arbitraria*, expressly conferring on the *iudex* the right to absolve if the thing claimed were restored to the plaintiff. But in *stricti iuris* actions the *formula* gave the *iudex* no such power, and since all his powers derived from the *formula*, the Proculians held that in such actions he could not formally absolve the defendant (although they would not, of course, have allowed the plaintiff to claim a second payment).

The strictness of the Proculian attitude to procedural *formulae* in general²³ may be further illustrated by the dispute between the schools over the effect of *specificatio*, to which reference has been made. This was probably a by-product of a dispute over the necessity of a strict description of the object claimed in the *formula* of a *vindicatio*. The Proculians would have contended that if the *appellatio* of the thing in the *formula* had changed, it must be regarded as a different thing.²⁴

The Proculians' strictness in adhering to the letter of a text is paralleled by their strict adherence to the form in those transactions which derived their legal validity from the carrying out of a particular

²³ Noted by Arangio-Ruiz (1912) *Studi econ.-giur. Univ. Cagliari* 84 *et seq.* (= *Rariora*, 34).

²⁴ F. Wieacker, "Spezifikation: Schulprobleme und Sachprobleme," *Festschrift E. Rabel* (1954), 2.289 *et seq.*

form. For example, a slave belonging to several owners, who received promises by stipulation or received something by mancipation, acquired benefits for them, in proportion to their respective shares in him. He could, however, acquire for one of his owners alone, but only if he stipulated expressly for that one or received in mancipation naming the particular owner expressly. Gaius, 3.167, reports a dispute over whether authorisation of the transaction by one of the owners had the same effect as naming him expressly in the stipulation or mancipation. The Sabinians thought that it did, whereas the Proculians held that the slave acquired for all his owners, just as if there had been no authorisation at all. Stipulation and mancipation were formal transactions and their legal effect derived from the relevant form. Whatever the intention of the parties, if they did not expressly incorporate a mention of the owner, whom it was intended to benefit, in the form, its ordinary effect could not be varied.

(b) *Disputes concerning the principles of obligations*

The Proculians consistently held that an *obligatio* had certain determinate features: it could be created and dissolved in certain ways recognised by the law; and people who entered into obligations had to accommodate themselves to these characteristics and could not alter them to suit themselves.

Thus it was agreed that an obligation could only be novated if there was a clear difference between the old obligation and the new, that is, the difference had to be in the constituent elements of the obligation: the parties, or what is owed, or the conditions under which it is owed. The Sabinians considered that if there was a guarantor more or less, that was enough to distinguish the old and new obligations and would therefore justify novation. The Proculians denied that the addition or removal of a guarantor could have any such effect, presumably because it did not make any change in the obligation itself (Gaius, 3.177–8).

Again, suppose the debtor, with the creditor's agreement, pays him something different to what was due (Gaius, 3.168). Is the obligation dissolved? The Sabinians said that it was dissolved *ipso iure*, no doubt on the practical ground that if the creditor voluntarily accepted a substituted performance, he had nothing left to claim from the debtor. The Proculians, on the other hand, held that the obligation was not dissolved, for performance can only extinguish an obligation if it is performance of what is due. The debtor could, of course, resist any further claim from the creditor who had accepted the substituted performance by a plea of fraud.

Similarly, if a man's son or slave commits a delict against his father or owner, no action can arise, because no obligation can be

created between a man and those in his power. Since there is no obligation, there can be no action, even if the son or slave passes into someone else's power or becomes *sui iuris*. Suppose someone else's son or slave commits a delict against me, in which case an obligation owed to me is created, and then he comes into my power, say by adoption or by purchase (Gaius, 4.78). I can bring no action while he is in my power, but is the action extinguished or merely dormant? The Sabinians said it was extinguished since the parties were in a relationship in which it could not have arisen. The Proculians thought that, although the action lay dormant as long as the delinquent was in my power, it revived if he left that power; presumably they argued that the *obligatio*, which had been created in this case, had not been extinguished. Again in most cases a buyer from me would be able to resist such an action on my account by pleading fraud.

A number of disputes turned on what was necessary to constitute a particular type of contract and what was the scope of the actions arising out of that contract.²⁵ The Sabinians tried to subsume new fact-situations under the old familiar categories. They identified divergent fact-situations with typical fact-situations and allowed the actions given in those typical situations, without any modification of the *formula*, so avoiding the recognition of new actions. In this regard they followed the traditional republican reliance on fictions which treated cases which were analogous as if they were identical. The Proculians recognised the differences and were ready to recognise new legal categories which would take account of those differences. They allowed not the identical action given in the typical situation, but an analogous, parallel action, with a modified *formula*.

The famous dispute over whether the price in sale had to be in money is an example of a dispute over the limits of a particular type of contract (Gaius, 3.141; D.18.1.1.1, Paul, 33 *ad edictum*). In essence the dispute was over the question whether barter could be regarded as a type of sale. Sabinus and his followers, who held that it could, cited in support of their contention common opinion and antiquity and also the authority of the poet Homer. They thus relied on the standard anomalist arguments of *vetustas* and *auctoritas*.²⁶ The Proculians rejected the assimilation of barter with sale, on account of their essential difference and the difficulty, in the case of barter, of distinguishing buyer and seller.

There seem to have been similar school disputes in connection

²⁵ E. Betti, "Sul valore dogmatico della categoria 'contrahere'" (1915) 28 *Bullettino istituto del diritto romano* 27, 88.

²⁶ P. Huvelin, *Etudes sur le furtum*, I (1915), pp. 778-779.

with the contract of hire,²⁷ which Gaius (3.144–5) says was governed by similar rules to those for sale. If I give clothes to a cleaner to be cleaned, and no reward is fixed, it being understood that I will pay later whatever we shall have agreed, there is a question (*quaeritur*) whether a contract of hire is formed. Likewise, if I lend you something for your use and receive in return something for my use, *quaeritur* whether that is hire. The Sabinian Gaius does not answer his own questions. Since, however, his example of the similarity of the rules of sale and hire is the rule that hire requires a *merces certa* to have been fixed, we may assume that the debate was going against the empirical Sabinian view, which would have answered both questions in the affirmative.

There were parallel disputes over the scope of contractual actions. Sabinus and his followers granted the contractual action in sale in a number of cases where the contract was void, because the object of the sale had ceased to exist, or turned out to be legally incapable of being sold, but the buyer had a claim against the seller.²⁸ The Proculians, on the other hand, denied that a contractual action could be available if there was no contract in existence and gave the aggrieved party either an *actio de dolo*, following Labeo's liberal use of that action, or an *actio in factum*. Where there was a contract to sell for a certain figure plus the profit—or a share of it—on a resale, the Sabinians allowed the seller to enforce payment of the profit by the *actio ex vendito*, whereas the Proculians required an *actio in factum*.²⁹

Another dispute over the appropriate action to enforce an obligation is mentioned in D.39.6.35.3 (Paul, 6 *ad leg. Iul. et Pap.*). A gift in contemplation of death (*donatio mortis causa*) became absolute only when the expected death occurred and until then it was revocable by the donor. There were two forms of gift. In the first, it was subject to a suspensive condition; the thing was handed over to the donee, but ownership did not pass to him until the donor's death. In such a case, if the donor revoked the gift, he could bring a *vindicatio* as owner to recover the thing. In the second form, ownership passed to the donee on delivery, but if the donor revoked, or recovered his health, the donee was obliged to reconvey the thing back to the donor. What action did the donor have in this case to enforce that obligation? The Sabinians gave the donor a *condictio*, *quasi re non secuta*, on the analogy of the cases of *condictio* where something had been

²⁷ Betti, *op. cit.*, p. 25; J. A. C. Thomas, "The Nature of *Merces*" (1958) *Acta Juridica* 191 *et seq.*

²⁸ P. Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (1958), pp. 64, 76, 79–82.

²⁹ D. Daube, *Studies in the Roman Law of Sale in Memory of De Zulueta* (1959), pp. 26–45.

handed over on the understanding that some return would be made and that return did not follow. What action the Proculians gave is not stated. Almost certainly they rejected the analogy as false, since in the cases mentioned the transaction was a bilateral contract. They would have followed Labeo, who conceived of *contractus* as covering exclusively transactions creating obligations on both sides (*contractum autem ultro citroque obligationem* (D.50.16.19, Ulpian, 11 *ad edictum*)).³⁰ *Donatio*, on the other hand, is unilateral. Regarding the case as *sui generis*, they would have given the donor an *actio in factum*.

As long as the action referred to a recognised obligation, however, the Proculians rigorously granted it, even in cases where the Sabinians did not. A accepts a mandate from B to buy a thing for B with a limit of price. If A buys the thing at a higher price, can he make B take it at the limited price?³¹ The Sabinians thought not, on the ground that when he bought it at a price exceeding that stated in the mandate, he was buying on his own account. On the other hand, A, who after all was acting gratuitously, out of *amicitia* for B, once he had gone to the trouble of attending the sale, might have found that he could obtain the thing for a price only slightly above the limit stated. In such circumstances, he might well have thought it worth while to buy it at that price, rather than waste his journey, in the expectation that B would probably pay the difference, but that if he did not, he (A) would do so. In such a case, the law should not enable B to think better of making the purchase and avoid the liability which he had undertaken in the contract to reimburse A up to the stated limit. The Proculians therefore allowed A to sue up to the agreed price (Gaius, 3.161, who gives only the Sabinian view; D.17.1.4, Gaius, 2 *rerum cottidianarum*, giving the view of Proculus; Just. *Inst.* 3.26.8).

An obligation which gave rise to several jurisprudential problems was that imposed by a testator on the heir named in his will to give certain legacies to third parties (legacy *per damnationem*). The Proculians insisted that this *obligatio* had similar characteristics to obligations created in other ways.

If the testator bequeathed a legacy subject to an impossible condition (e.g., if he touch the sky with his finger), the Sabinians held that it should be treated as if it had been left unconditionally (Gaius, 3.98). The Proculians, on the other hand, pointed out that a promise by stipulation, subject to an impossible condition, was invalid,

³⁰ Discussed by Sven Erik Wunner, *Contractus: sein Wortgebrauch und Willensgehalt im klassischen römischen Recht* (1964), pp. 33–41.

³¹ Discussion of the case, A. Watson, *The Contract of Mandate in Roman Law* (1961), pp. 186–190.

and that on the same principle the legacy should be equally invalid. Even the Sabinian Gaius had to admit the difficulty of providing a satisfactory basis for the distinction (*vix idonea diversitatis ratio reddi potest*).

Again, if the testator purported to give a legacy *per damnationem* to one who was in the power of the heir, the Proculians held that it was void, whether the legacy was conditional or unconditional, because an obligation—be it conditional or unconditional—cannot be created between a man and one who is in his power (Gaius, 2.244). The Sabinians thought that if the legacy was conditional, it was good, on the ground that the legatee might have left the heir's power by the time the condition was fulfilled. However, a conditional *obligatio* was still an obligation and the Sabinian view involved a breach of principle.

In D.29.7.14, Scaevola (8 *quaestionum*) reports the following case. The testator made a will instituting certain persons as heirs and substituting others as heirs, if those instituted failed to take the inheritance. The instituted heirs died in his lifetime, and after their death he made codicils revoking or adding legacies. The school dispute was over the validity of such revocation or addition. Sabinus and Cassius held that they were valid, because there was a general principle that codicils are regarded as part of the will and that, if the will is valid, they take effect and preserve the formal validity and legal declaration made in the will (*observationemque et legem iuris inde traditam servant*). Proculus argued from the accepted rule that a legacy was void if it was given by a codicil to a man who was alive when the will was made but had died when the codicil was made. In this case the heir, to whom the legacy (*per damnationem*) was addressed, had died and so the legacy was equally void. Proculus then adds significantly that one should check the existence of the parties before seeking the principle behind the law (*non ante iuris ratio quam persona quaerenda sit*). The Sabinians had attempted to throw at Proculus the usually Proculian argument based on the *ratio iuris* and he replied, in effect, that *ratio iuris* had no place in a situation where the constitutive elements for the legal relationship in question were not all present.

In each of these three cases, the Sabinians clearly wanted to give effect to the will of the testator by holding the legacy to be valid. In the case of the legacy subject to an impossible condition, it could reasonably be objected that a testator, who made his gift conditional on the legatee doing something that he could not in fact do, did not really want him to have it. In the other two cases the Proculian view is that a testator cannot play fast and loose with the fundamental requirements of legal relationships, such as the necessity for an

obligation to be constituted between two parties in existence, neither being in the power of the other.

(c) *Disputes concerning wills and succession*

Where no basic principles such as those considered above were involved, the Proculians were anxious to give effect to the testator's expressed will.

An illustration of the Proculian use of reason and logic to validate an unusual testamentary provision is their attitude to the question of the validity of the appointment in a will of a tutor, which preceded the institution of the heir (Gaius, 2.231). It was an accepted rule that a legacy or gift of freedom, which preceded the institution of the heir, was invalid. The Sabinians held that the same rule must apply to the appointment of a tutor. The Proculians, before extending the rule, asked what was its *ratio*. They observed that grants of legacies and manumissions were both provisions which diminished the inheritance, and were therefore prejudicial to the heir, so that logically they should follow his institution. This reasoning did not apply to the appointment of a tutor, and therefore such an appointment was valid, even though it preceded the institution of the heir.

The Proculians showed a similarly liberal view in another case on the validity of a will (Gaius, 2.123). It was trite law that if a son, who was in his father's power, was neither instituted heir nor expressly disinherited, but was just passed over, in the father's will, that will was invalid. But suppose the son died in his father's lifetime. The Sabinians held that the will was invalid, *ab initio*, and the son's death could not validate it. The Proculians held that it should take effect. They emphasised that a will takes effect only on the testator's death, and at that moment there was nothing standing in the way of its validity.

An analogous problem arose when there was a child *en ventre sa mère* at the time of the testator's death, and that child would, if he were born, be a *suus heres*; in such a case, if the testator passed him over, the will was void. What was birth for this purpose? The Sabinians held that if the child were born and died without uttering a cry, the will would still be invalidated. We have no express statement of the Proculians' position, but almost certainly they held that at least a cry was necessary as proof of a live birth (C.6.29.3). They wished to give effect to the will if possible, and so they required stricter proof of a live birth which would invalidate it.

The familiar Proculian reasoning was deployed on the question of the effect of a surrender of the inheritance by a necessary heir (Gaius, 2.37 and 3.87). It was agreed that if an ordinary heir,

instituted in a will, accepted the inheritance and then made *in iure cessio* of it to another (*i.e.*, surrendered it *en bloc* in court), he remained liable to the creditors of the inheritance for the debts owed by the deceased, the debts owed to the inheritance by debtors of the deceased were extinguished, and corporeal things in the inheritance passed to the surrenderee, just as if they had been surrendered one by one. A necessary heir was a slave who was liberated and made heir by the will. He became heir without the need for acceptance, whether he wanted to be heir or not, so that the testator, whose estate might be insolvent, should not suffer the posthumous indignity of having no heir. Could such an heir validly surrender the inheritance? The Sabinians denied this on the ground that, being an involuntary heir, he could not give up his position. The Proculians held that a surrender in this case had the same effect as a surrender made by other heirs who had accepted the inheritance. For an heir is an heir, whether he achieves that position by formal acceptance or by acting as heir, or by necessity, and he cannot be deprived of the legal powers of an heir. Furthermore the purpose of instituting a necessary heir would still be achieved, since, although he had transferred the corporeal assets to another, he would still be the testator's heir and liable to the testator's creditors for his debts.

Sometimes the Proculians appear to carry their abhorrence of illogical reasoning to extremes. Two disputes in which they give an impression of undue rigidity concern legacy *per vindicationem*, which operated as a direct conveyance from the testator to the legatee, as soon as the heir entered on the inheritance. Did a thing so bequeathed become the legatee's property immediately at that moment, whether he knew about it or not (Gaius, 2.195)? The Sabinians thought that it did, but that, if the legatee later repudiated the legacy, it was treated retroactively as never having been his. The Proculians held that the legatee acquired no title until he accepted and that meanwhile the thing was *res nullius*. Again, if such a legacy was bequeathed conditionally, to whom did it belong, pending the condition? The Sabinians compared the case of the *statuliber*, a slave manumitted by the will subject to the fulfilment of a condition, who remained the property of the heir until fulfilment, and held that the legacy also belonged to the heir pending the condition. The Proculians held that, as in the case where the legatee had not yet accepted, the thing was *res nullius*.

At first sight there seems to be little to say in favour of the Proculian view, but the Sabinian doctrine involved some rather circular reasoning.³² The repudiation was an alienation, in that the

³² P. Voci, *Diritto ereditario romano*, II (1963), pp. 372 *et seq.*, 388 *et seq.*

things moved out of the ownership of the legatee (cf. Ulpian in D.27.9.5.8). Yet its retrospective effect implies that the thing has never belonged to the legatee, and that suggests that the alienation was invalid. Furthermore, although the principle of retroactivity works satisfactorily as between the heir and the legatee, a third party who receives the thing from the heir must be satisfied that the latter acquired it by a recognised mode of acquisition. How precisely had the heir acquired it? Again, with regard to the conditional legacy pending the condition, if the heir is owner, in principle he has the rights of the owner over the thing; but, once the condition has been fulfilled, ownership passes automatically to the legatee and he has a right to the thing as it was when the heir entered on the inheritance. The Proculian view avoids these complications, although at the cost of the thing belonging for a period to no one, which might in practice be unsatisfactory.

The Proculians were less tolerant than the Sabinians of historical survivals which constituted exceptions to the system of rules which had been developed. A legacy *per praeceptionem* was in the form: "Let Titius take in advance (*praecipito*)" (Gaius, 2.216–222). In the Sabinian view, which seems to have been historically correct, a legacy in this form was valid only if the legatee was himself an heir and the thing bequeathed had belonged to the testator at death, and it was enforceable only in the action for partition of the inheritance (*actio familiae erciscundae*). The Proculians held that the prefix *prae* was superfluous and that *praecipito* should be construed as *capito*. As a result the legacy could be considered to have been given *per vindicationem* and, if it had belonged to the deceased, the thing bequeathed could be vindicated by the legatee. It is somewhat surprising to find the Proculians not giving precise weight to a testamentary formulation. It seems, however, that legacy *per praeceptionem* went back to a time before the development of the classical system of succession which attributed to each co-heir an undivided share of the inheritance³³ and its existence as a separate category of legacy was anomalous; it derogated, for example, from the rule *heredi a semet ipso inutiliter legatur*. The Proculians, in their desire to implement the will of the testator, boldly proposed a conversion of the institution into another, more regular, type of legacy.

(d) *Miscellanea*

Most of the school disputes were about *interpretatio verborum*, the basic principles of obligations or testamentary provisions. In

³³ Possibly to the ancient *consortium erecto non cito* of co-heirs, J. F. Leuba, *Origine et nature du legs per praeceptionem* (1962); rev. G. I. Luzzatto (1963) 29 *Studia et documenta historiae et iuris* 394–400; G. Grosso (1963) 14 *IURA* 284–288.

the occasional disputes on other topics, the Proculians adopt the same approach which has been noted with regard to these.

The schools disagreed over the moment when a male child reached the age of puberty, so that he was freed from *tutela* (Gaius, 1.196; Ulp. 11.28). The Sabinians said that it depended on the individual's physical development, but in the case of those who were naturally impotent, the usual age must be taken. The Proculians argued that puberty must be judged by age alone and that a boy reached puberty when he became fourteen years. In this case the Sabinians clearly adopt an anomalist, empirical principle whereas the Proculians favour the analogist preference for one objective rule for all cases.³⁴

Another dispute on a similar point concerned the moment at which animals became *res Mancipi* (Gaius, 2.15). Only those animals which were broken in for pulling and carrying (*quae collo dorsove domantur*) fell into this category, and consequently could be transferred only by the formal *mancipatio* or *in iure cessio*, instead of by mere delivery. The Sabinians considered that such animals were *res Mancipi* from birth, while the Proculians held that they were *res Mancipi* only when they were broken in, but if they proved to be too wild to be broken in, then they were to be considered *res Mancipi* at the usual age for breaking in.

Why did the Proculians not prefer a simple, straightforward rule, as they did in the case of the age of puberty? Here the social function of the rule has to be considered. In a primitive economy the main value of cattle was as agricultural instruments for such purposes as pulling ploughs or carts. They had only minor importance in the production of milk or meat, which was largely supplied by sheep and goats. The traditional explanation³⁵ is that cattle became fit subjects for formal conveyance by *mancipatio* only when they were old enough to be trained to pull or carry. As calves they would be transferable by simple delivery. Thus the Proculian view would be the older, and the Sabinian view, which did not distinguish between calves and fully grown cattle, would be the more recent. This explanation has recently been rebutted by Nicosia,³⁶ who observes that a widening of the category of animals who were *res Mancipi* would have been contrary to the recognised trend to restrict the category, as shown by the refusal to include elephants and camels in it, even though they were trained to pull and carry. He shows that the Sabinian view was the

³⁴ Huvelin, *Etudes, cit.*, ante, n. 26, p. 778; T. Mayer-Maly, "Die Grundlagen der Aufstellung von Altersgrenzen durch das Recht" (1970) *Zeitschrift für das gesamte Familienrecht* 618, sees the dispute as a choice between "individualising" and "type-formation."

³⁵ Most succinctly expounded by P. Koschaker (1938) 58 *Zeitschrift der Savigny Stiftung (rom.Abt.)* 267, n. 1.

³⁶ "Animalia quae collo dorsove domantur" (1967) 18 *IURA*, 45-107, cf. K. D. White, *Roman Farming* (1970), pp. 276 *et seq.*

older, and that the Proculians aimed to restrict the scope of the category and so allow animals which were destined for meat to be transferred by informal delivery. This was in the interest of the big beef producers on the large estates, which grew up in the late Republic, where it might sometimes have been difficult to bring together the six Roman citizens required by *mancipatio*. The Proculians doubtless favoured a rule that only animals which were actually tamed were *res Mancipi*, but they accepted a modification of it to the extent that animals which reached the normal age for taming were also *res Mancipi*, whether they were actually broken in or not. Such a modification would have been inexplicable, if the Proculians were defending an old view against a Sabinian attempt to extend the category, but is understandable as a concession to make their newer view acceptable.

Finally, there was a dispute about the effect of the abandonment of a thing by its owner (D.41.7.2.1, Paul, 54 *ad edictum*: D.47.2.43.5, Ulpian, 41 *ad Sabinum*). Sabinus and Cassius held that it immediately ceased to be his, whereas, in the view of Proculus, it continued to be his, until it was taken into possession by someone else. The Sabinian view is again probably the older and seems more natural. It could, however, lead to abuse.³⁷ An owner could avoid liability for *damnum infectum* by abandoning the land which was harming his neighbour (D.39.2.6, 7.2).³⁸ If the owner declared that he was abandoning the part of his land which was subject to the claim for *damnum*, and if that declaration was immediately effective in divesting him of ownership, he could plead that he was no longer liable.³⁹ Access to the abandoned land by strangers might be impossible except through other land retained by the owner, so that there would be little risk of someone else occupying it. Then after an appropriate interval, the owner would proceed to reacquire it. Proculus' reinterpretation of abandonment was an attempt to forestall such dodges, and is in accord with Labeo's forward-looking conception of law as requiring adaptation in the face of new situations.⁴⁰

³⁷ D. Daube, "Derelictio, occupatio and traditio: Romans and Rabbis" (1961) 77 L.Q.R. 389, suggesting that the object of abandonment was to avoid land-tax. But Italic land, alone the object of *dominium*, was not subject to *tributum*, and in any case it is difficult to imagine treasury officials falling for such a ruse.

³⁸ Cf. the opinion of Proculus in D.3.5.9.1, and that of Labeo in D.8.5.6.2 (on abandonment to avoid liability in respect of a servitude *oneris faciendi*).

³⁹ S. Romano, *Studi sulla derelizione nel diritto romano* (1933), pp. 50, 142-145.

⁴⁰ The Proculian school was particularly interested in the jurisprudential analysis of possession, especially with regard to the mental element. It was probably Labeo who first formulated the proposition that we acquire possession *animo* of certain things, such as those which we have bought and placed a guard over (D.41.2.51). Proculus and Neratius laid down that, provided that *naturalis possessio* already exists, possession can be acquired *solo animo* (D.41.2.3.3). G. MacCormack, in his careful study of "The role of *animus* in the classical law of possession" (1969) 86 *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* (rom.Abt.) 105-145, points out that "the Proculians were cautious

III

This survey of the different school controversies shows, I submit, the nature of the Proculian approach to legal problems and the extent to which it differed from that of the Sabinians. We must now assess the significance of these differences.

Throughout the Republic, law, *ius*, was not thought of as a set of rules. It was originally an amorphous notion, indicating what was right in a particular situation. It was not a man-made product but part of the Roman way of life, and it could be manifested in various ways. Primarily it was declared expressly in a *lex*, which could either have a general application or merely express what was right between certain parties (*lex privata*). Alternatively, the law could be indicated by custom and practice or the nature of the case might suggest what was right. In the last century of the Republic, the jurists felt the need to set out this law in a series of propositions, which were normally formed by generalising the effect of particular decisions. These so-called *definitiones* were given technical precision in the pioneer work of Q. Mucius Scaevola, and, by the end of the Republic, some lists of the places in which the law was to be found included the opinions of the jurists and the edicts of the praetors, alongside the traditional sources of law.⁴¹

Labeo now carried the process of development one stage further. His interest in linguistic analogy led him to make a systematic introduction of certain techniques of analogy into Roman legal thinking. It was probably Labeo who introduced the notion of *regula*, which was not just a descriptive generalisation, like *definitio*, but a normative proposition, covering cases which fell outside its terms but within its *ratio*, or basic principle.⁴² Labeo did not abandon the more traditional techniques of law-finding; he added new ones.

Labeo's methods were adopted by the Proculians, while the Sabinians stuck to the traditional Republican ways. This does not mean, however, that their disputes resolve themselves into battles between analogists and anomalists.⁴³ Many disputes were not directly

in the use they made of the notion of *animus*," and concludes: "The evidence is not sufficient to establish that there was a clear cut controversy between the schools on the question of *animus*; merely that the Proculian jurists were responsible for developing the early rules of possession framed in terms of *animus* (which have survived) and that on occasion the Sabinian jurists or some of them objected to their conclusions" (pp. 119-120).

⁴¹ Discussion in G. Crifò, "Attività normativa del senato in età repubblicana" (1968) 71 *Bullettino istituto del diritto romano* 80-103.

⁴² Stein, *Regulae iuris*, cit., pp. 49 *et seq.*; cf. F. Wieacker, rev. (1967) 84 *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* (rom.Ab.) 438.

⁴³ As argued by M. Schanz, "Die Analogisten und Anomalisten in römischen Recht" (1884) 42 *Philologus* 312 *et seq.*; for a more reasonable view, H. Dirksen, "Über die Schulen der römischen Juristen," *Beiträge zur Kunde des römischen Rechts* (1825), pp. 1-158.

related to that controversy and the opposing positions were more complex than such labelling suggests.

In the face of cases in which the law was in doubt or the situation was unforeseen, the Proculians had at their disposal a wider range of techniques than were available to their opponents. On the other hand, when the case could be categorised as involving *interpretatio verborum*, they could afford to stand firm on the application of the objective meaning of the words, in the interests of certainty and the encouragement of exact drafting. The first group of cases shows how consistently they took this line.

Where the relevant law was unwritten, it was not necessarily uncertain. The notion of obligation had been so refined by juristic discussion, that its basic structure was solidly established. The second group of cases shows that the Proculians insisted that this structure was a coherent, rational whole and that effect should be given to its component principles, wherever they applied. Further, legacies *per damnationem* were essentially obligations imposed on the heir, and consequently could not be treated differently from other kinds of obligation.

This consideration apart, the Proculians consistently gave effect to the intention of the testator, as expressed in his will or codicil, without requiring him to be specially scrupulous in observing the customary modes of expression. The disputes on succession matters, other than those involving legacies *per damnationem*, show the Proculians taking a positively liberal line. Only when a suggested solution to a problem seemed to be illogical or to flout basic principles, did they demur.

Often the disagreement of the schools was not over whether there should be a remedy but over which action it should be. The Proculians cared more than did their opponents about preserving the lines which marked off the areas of application of the established actions. They realised that only by so doing could they recognise when a new situation had arisen and so take a deliberate decision about the appropriate way to deal with it. Only at this point did the Proculians turn to analogy proper, for the techniques of analogy enabled them to provide for new cases, without disturbing the rational structure of the existing law. That is why it was the Proculian methods which were adopted increasingly by the imperial chancery, although Labeo himself had been a staunch political opponent of Augustus and stood for a return to republican government.

The Sabinians, on the other hand, did not give an impression of consistency. They did not adhere so strictly to the objective meaning of texts, if they were implementing what they thought the parties wanted. They did not worry much about infringing the principles of obligation, if the solution they advocated seemed to be satisfactory

in the given situation. They did not look below the surface of a case, nor did they trace the implications of a decision in situations other than that in which it was given. They relied on the experience of the past and had a limited vision of the capabilities of the law in the face of new situations. Thus, by contrast with the Proculians, the Sabinians sometimes appear liberal and sometimes conservative. They would no doubt have agreed with Justice Holmes when he began *The Common Law* with the words: "the life of the law has not been logic: it has been experience." Like the traditional common lawyers, they distrusted dogmatic, rationalist arguments and were more interested in the decisions themselves than in the manner in which they were reached. As Daube observed,⁴⁴ with regard to the Sabinians' wholesale granting of the contractual action in sale, "there was a danger that this approach might interfere with the subtle, classical system in which each contract had its own, individual rules adapted to a narrow field. . . . The Proculians would look on too rash an expansion of *ex vendito* as leading to confusion, to a law of 'mish-mash'."

Had it not been for the Proculian emphasis on rationalism, the classical Roman law would not have acquired that particular characteristic of empiricism within the framework of basic principles which has proved its attraction to later ages.⁴⁵

⁴⁴ *Op. cit.*, ante, n. 29, p. 33.

⁴⁵ I am most grateful to Mr. J. A. Crook, F.B.A., for commenting critically on this paper.

A CHANGING INTERNATIONAL LAW OF THE SEA

R. Y. JENNINGS

THE legal régime of the sea has been a persistently important theme of the law of nations from the beginning; but it has probably never been more dominant than it is at the present time, touching as it does so many of the most vital interests of nations, such as the supply of food and of energy; politically sensitive questions like defence and immigration; and some of the most pressing aspects of pollution and conservation problems. With this renewed importance of the law of the sea have come also new doubts about its content and meaning, and even about the underlying legal principles. Half a century ago, the law of the sea was relatively simple, certain and stable, at any rate in time of peace. The classical dispute between the closed sea and open sea doctrines seemed at last to have been finally resolved on the basis of a kind of dualism by which the coastal state was to have sovereignty over a belt of territorial waters, subject to the general right of innocent passage, and the high seas outside that maritime belt were to be *res communis*, not subject to acquisition by title of sovereignty, but subject to an international régime which was spelt out in terms of the so-called "freedoms" to be enjoyed by the flags of all nations, the most important being the freedom of navigation and the freedom of fishing.

It was this classical system which provided the main structure of the law of the sea as it was eventually codified in the Geneva Conventions of 1958. Those conventions, however, also embraced certain significant new developments: the almost brand-new coastal state's exclusive rights over its "continental shelf"; the coastal state's contiguous zone jurisdiction; and the straight baseline method of demarcating territorial sea in certain kinds of localities. No less significant was the continued failure to agree a maximum breadth for the territorial sea: a failure first encountered at the Hague Conference of 1930 and again at the Geneva Conferences of 1958 and 1960, even though the latter conference was called for the specific purpose of securing agreement on that question. All this was indicative—perhaps more than was appreciated at the time—of a general tendency towards the extension and augmentation of the coastal state's legal powers. Article 1 of the Geneva Convention on the High Seas might indeed be thought to have set the keynote when it defined the high

seas as being all the parts of the sea which were "not included in the territorial sea or in the internal waters of a state."

The 1958 codification was a very successful consolidation of maritime international law; so much so that it quickly became almost impossible to discuss the law of the sea without reference to those texts, and their influence has extended far beyond the strict ambit of the list of actual ratifications, respectable as that list is.

It is all the more remarkable, therefore, that within a very few years of these conventions coming into force, the General Assembly of the United Nations should, after consultation with governments, at its 1970 session, have proposed the holding in 1973 of another conference on the law of the sea, not to fill the gaps left at Geneva, or even to deal with the particular problem of a new equitable régime for the resources of the sea-bed and ocean floor, but to consider

a broad range of related issues including those concerning the régimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environment (including, *inter alia*, the prevention of pollution) and scientific research; . . .¹

There was no doubt a variety of reasons for this decision to call together a conference to reopen so many aspects of sea law which, immediately after the 1958 codification, had seemed settled for a long time to come. A major consideration obviously was the great changes in the structure of the international community that have taken place since 1958; and not least the fact, recited in the Resolution, that "many of the present States Members of the United Nations did not take part in previous United Nations conferences on the law of the sea. . . ." Whether this fact, important as it is, should seem to invalidate work of the International Law Commission is an important question to which the answer is not obvious. In any case it may be questioned whether it was wise to think of calling together a major conference without the benefit of proper scientific preparation by the International Law Commission which, more than any other single factor, helped in the success of the 1958 Conference—but these are questions of policy which it is not proposed to canvass further in this article. It is proposed instead to inquire how it should have come about that so soon after a major codification of this part of the law, the law should have become so plastic and so much in process of

¹ Resolution 2750 (XXV) of 17 December 1970: Resolution "C" from which the above passage is cited was passed by a vote of 108 in favour, 7 against, with 6 abstentions.

change and development that a new attempt at legislation should be thought to be both possible and desirable.

There can be no doubt about the general direction of the changes—the direction already presaged in the innovations found in the Geneva Conventions—namely, what at the present time is sometimes called “creeping national jurisdiction”; though it must be understood that by this is meant only one kind of national jurisdiction, *i.e.*, the jurisdiction of the coastal state (not the flag jurisdiction, though this too is a “national” jurisdiction).

The seaward progression of coastal state jurisdiction, by un-hinging the frontier between the zone of exclusive national jurisdiction and sovereignty, and the part of the sea which is *res communis*, has threatened to reawaken, though in a new form, the old debate between the open sea and closed sea schools. There has not only been a tendency for the claims of the coastal state to push seawards, but there has also been a great development in the complexity and elaboration of these claims; and this in turn has precipitated a new series of limit, or boundary, problems. It will be useful at this point, therefore, to look at some of the different forms and concepts that have appeared as part of the tendency of coastal-state claims to override the traditional limits of their competence.

Jurisdictional claims of coastal states

Looking back one can see very clearly that the turning point was the judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*²; for the effect of that decision in loosening the grip of the old law about sea boundaries can hardly be over-estimated. That judgment had the effect of detaching the territorial sea from the coast by making a major breach in the old tide-mark rule. It is true that the straight baseline method of delimiting the territorial sea was confined in its application to localities which were either deeply indented or having a fringe of islands³; but this raises questions of degree and hence leaves room for subjective appreciation: a subjective appreciation which must, in the first place at least, be one for the coastal state itself to exercise. Moreover, by sanctioning in certain kinds of locality an egregious extension of internal waters, enclosed by straight baselines, the judgment laid the essential foundations for the present archipelago claims, which would make vast areas of seaway into internal waters with the result that even the inner limit of the territorial sea might be many miles out to sea.⁴ No doubt

² [1951] *I.C.J. Reports* 116.

³ See Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.

⁴ There is an irony in the circumstance that the Court was able to say in its judgment: “The attempts that have been made to subject groups of islands or

these archipelago claims are disputed: but in a law which is still in essence a distillation from practice, a claim that is not disposed of in the short run, tends in the long run itself to shape the law to its own needs.⁵ Though it may well be that the *Fisheries* judgment was a proper decision in relation to the particular dispute before the Court, there can be little doubt that the vague generality of some of its reasoning resulted in a relaxation of existing legal principles greater than even its severest critics realised at the time.⁶ And this relaxation had perforce to be built into the 1958 codification.

The possibility of extending internal waters into the high seas has not, however, halted the tendency to extend the claimed breadth of the territorial sea proper, but rather the contrary. The battle for the three-mile limit was probably finally lost at Geneva in 1958. There were by 1969 more than fifty states with a twelve-mile territorial sea; not mere claims, but promulgated and enforced laws. Indeed, there are some sixty-four states with territorial seas established at twelve miles or more⁷; though it is fair to add that some of the claims to more than twelve miles of coastal jurisdiction have the appearance of the adoption of a negotiating position rather than hard and final claims to so extensive a territorial sea in the full sense.

A further rubric for the extension of coastal state jurisdiction is the contiguous zone jurisdiction. The Geneva Convention on the Territorial Sea and the Contiguous Zone permitted the exercise of contiguous zone jurisdiction by the coastal state for four defined purposes in a zone up to twelve miles from the baseline of the territorial sea. The convention does not make it clear whether such a jurisdiction may be exercised at any time in that zone, or whether there is a need first to promulgate the establishment of such a zone; though the presumption would seem to be that there is no such need of prior promulgation. The jurisdiction is limited to the four headings: "customs, fiscal, immigration or sanitary regulations within

coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals." See [1951] *I.C.J. Reports* 131.

⁵ For a full discussion of archipelago claims, see O'Connell in (1970) XLIV *British Year Book of International Law*.

⁶ For a realistic appraisal, see Judge Sir Gerald Fitzmaurice in *Cambridge Legal Essays in International Law* (1965) at p. 39: "[The judgment in the *Fisheries* case] has also been much misunderstood, for although its repercussions have been immense, the actual issue involved related (in the direct sense) only to a particular, and by no means the most important, aspect of the law of the sea. It is more as a catalyst that the decision has influenced the law in general, by facilitating a process which may still not have reached its culmination."

⁷ See *Limits and Status of the Territorial Sea, Exclusive Zones, Fishery Conservation Zones and the Continental Shelf*, published by the Food and Agriculture Organisation of the United Nations, Rome 1969.

its territory or territorial sea”⁸; but it must be added that these four headings comprise, or could comprise, a very considerable range of offences. The convention provisions are at some pains to make it clear that the contiguous zone is “a zone of the high seas.” The intention was doubtless to set clear limits to this kind of jurisdiction. But the insistence that the contiguous zone is a zone of the high seas is a two-edged device. For whilst it somewhat qualifies the jurisdiction in one way, it also concedes in principle the exercise by the coastal state of an extraterritorial jurisdiction on the high seas, and is therefore an important stage in the acceptance of qualifications of the exclusiveness of the flag jurisdiction on the high seas.

Claims to jurisdiction within a contiguous zone up to twelve miles from the territorial-sea baseline have not in the event been limited to the four topics enumerated in Article 24; or indeed to extraterritorial jurisdiction. Even the traditional supporters of the three-mile territorial sea have proclaimed twelve-mile fishing zones. Even when such a claim is backed by a regional treaty, it is still not easy to reconcile with the provisions of the Geneva Convention on the High Seas, which defines the high seas as being the area outside territorial sea, and further defines one of the freedoms of the high seas régime as being the freedom of fishing⁹; for these fishing zones constitute a claim both to exclusive rights to resources of the high seas, and also to jurisdiction to enforce those rights directly within a zone of the high seas.

Most radical of all, however, in its effect, has been the now universally accepted claim of the coastal state to exclude all others from the exploration and exploitation of the resources of the sea-bed and subsoil of the “continental shelf” off its shores: a claim finally consolidated in the 1958 Geneva Convention on the Continental Shelf. Article 1 of that convention defined “continental shelf,” for the purposes of the convention, in open-ended terms; so that the only clear limiting element in the definition is the term “adjacency” which is indeed unmistakably limiting, but gives no clear guidance where the limit is to be found. It is the location of this particular limit that is at the centre of present controversy over the international law of the sea. For it is the “creeping” jurisdiction of the coastal state over continental shelf resources that gives the appearance of being in conflict with those promises held out in a flush of popular, though not necessarily well-founded, science, of riches for “mankind” in the area of sea-bed “beyond national jurisdiction.”

It is this apparent conflict of interests, with its seeming requirement of a decision between the “national” interest on the one

⁸ See Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

⁹ See Articles 1 and 2.

hand, and the interests of "mankind" on the other, which is responsible for a somewhat shrill note in the demand for the halting of any further encroachment of "creeping national jurisdiction." It is to be recollected, however, that the interests comprehended under the *existing* law of the seas "beyond national jurisdiction," to use the current but misleading phraseology, are every bit as "national" as those that are comprehended under so-called "creeping national jurisdiction." Consequently, the impression sometimes given of a choice between the pure national and the pure international interest is a dangerous over-simplification. It may be useful, therefore, to take a closer look at what is at present involved in the existing international régime of the high seas.

The régime of the high seas

What is the legal nature of the high sea or open sea; and how does this differ from the régime of territorial sea? The essential quality of the high sea has always been that, in the words of the Geneva Convention on the High Seas, "the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty"¹⁰; though this classic proposition should now perhaps be qualified since, in the *Fisheries Case*, Norwegian decrees, which had precisely the effect of subjecting parts of the high seas to Norwegian sovereignty, were held to be in accord with international law. Indeed, assuming that a maximum breadth of territorial sea is laid down by international law and that it is more than one marine league, any extension of a state's territorial sea to the permitted maximum, as well as any permitted adoption of the straight baseline method in a particular locality, would be in conflict with the basic principle as it is so flatly stated in Article 2 of the convention. Nor, for that matter, does it sit easily alongside Article 1 of the same convention, which defines the high seas as a remainder, *viz.*, the "parts of the sea that are not included in the territorial sea or inland waters of a State." Perhaps the position now is that there is some belt of sea which, being appurtenant or contiguous to a coastal state, might in one way or another or for one purpose or another be lawfully subjected to that state's sovereignty, but continues to have the status of high seas unless and until that happens; and that it is only in the area beyond that belt of appurtenant waters or sea-bed that the absolute prohibition expressed in Article 2 applies. No doubt, as the International Court of Justice said in the *Fisheries Case*, "The delimitation of sea areas has always an international aspect; it cannot be dependent

¹⁰ Article 2 of the Geneva Convention on the High Seas (1958).

merely upon the will of the coastal state as expressed in its municipal law . . .”¹¹; but that statement, important as it is, raises many questions and answers none of them.

But to think of the régime of any part of the seas simply in terms of sovereignty, or the absence of sovereignty, is to lose sight of some of the most important legal facts of the situation. On the one hand there is the very important fact that the territorial sea, which is indeed by definition subject to the exclusive sovereignty of the littoral state, is also subject to the internationally established right of innocent passage. Indeed, according to the Geneva Convention on the Territorial Sea and the Contiguous Zone, even those parts of internal waters which result from the enclosure within straight baselines of “areas which previously had been considered as part of the territorial sea or of the high seas,” are also subject to the right of innocent passage¹²; and it is probably right to regard this as more than a mere treaty right, being rather the inescapable consequence of the character of innocent passage as an international right, which cannot, therefore, be terminated by operation of a municipal law newly extended to a particular zone of the sea. Innocent passage is a primary principle of international law, every bit as important as the freedom of the high seas itself, to which indeed it is a necessary complement. Freedom of navigation on the high seas means little or nothing without the freedom of innocent passage through territorial waters and straits. Thus the territorial sea, though subject to the national sovereignty and jurisdiction of the coastal state, is subject to a sovereignty importantly qualified by international law rights enjoyed by states generally.

On the other hand, turning now to the régime of the high seas, it is mistaken to suppose that the high seas, being beyond sovereignty, constitute an area beyond the reach of national jurisdiction. On the contrary, the governing principle that jurisdiction follows the flag means that order on the high seas is founded upon the exercise of national jurisdiction. A significant legal fact is that this same flag jurisdiction is also operative in respect of a vessel exercising the right of innocent passage in a territorial sea. The difference is that in the territorial sea the flag jurisdiction is a qualification of an otherwise single, ambient territorial jurisdiction; whereas on the high seas there is no single, ambient jurisdiction, indeed no ambient jurisdiction at all; and the system of order depends, accordingly, upon a multiplicity of temporary, roving and sometimes overlapping jurisdictions based essentially on the principle of nationality. Thus there is, even in the traditional law, no great divide between the

¹¹ [1951] *I.C.J. Reports* 132.

¹² See Article 5 (2).

régime of littoral waters and the régime of the high seas; both are essentially inter-related, compromise régimes and both are capable of modification in the one direction or the other without doing violence to the essentially integrated structure of the international law of the sea as a whole.

It follows also from the nature of this structure that the so-called "freedoms" of the high seas régime, again like the rights of innocent passage in littoral waters, are freedoms not of individuals, or of corporations, but of recognised states; and are therefore to be enjoyed only under the legal umbrella of a particular state's national jurisdiction. Accordingly, a vessel that is not entitled to fly the flag of any state in being is not entitled to complain of an interference with the freedom of navigation on the high seas.¹³ Moreover the need for a nationality status is not confined to vessels. Early this century the United States assumed jurisdiction over a gambling house established on the ice outside the territorial sea of Alaska.¹⁴ More recently a court in Florida took a similar view of attempts by United States citizens to establish an independent commercial republic on an artificial island outside the territorial sea.¹⁵ Again, the Netherlands assumed that it had jurisdiction to suppress the R.E.M. television island outside Netherlands territorial waters.¹⁶ Certainly in all these cases the position would have been less clear had a third state of which individuals concerned had been nationals been actively involved; but this merely provides an additional proof of the proposition that the freedoms are the freedoms of recognised states.

These are elementary propositions, but they need to be restated in order to correct the impression sometimes given—especially in dealing with the sea-bed and subsoil "beyond national jurisdiction"—that the high seas, being in some sense international, is therefore an area where an international agency could assume jurisdiction and control without legal difficulty. This is not so; though the great legal problems involved tend to be obscured by the extreme vagueness and inexactitude of the ubiquitous term "international." It is as if it were to be suggested that a governmental agency could assume control of common land, not by virtue of some enabling law, but *ipso facto* because the land is in common, and not in single, ownership. This is not to say that an international agency could not be granted rights of jurisdiction and control over the high seas, or the sea-bed beyond national jurisdiction; indeed

¹³ *Naim Molvan v. Attorney-General for Palestine* [1948] A.C. 531.

¹⁴ (1904) XI *Revue General de Droit International Public* 340.

¹⁵ *U.S. v. Ray*, 281 Fed.Supp. 876 (U.S. District Court S.D. Florida 1965).

¹⁶ See J. P. A. Francois (1965) XII *Netherlands International Law Review* 113.

this may well come about in some degree in the reasonably near future. But it is important to realise what a radical change in the law of the high seas has to be accomplished in order to bring this about. For there is at present no notion of "international territory" in international law; indeed the fact that this looks like a contradiction in terms, is a measure of the novelty of it. Nor do the régimes of the Antarctic Treaty or of outer space afford any assistance: rather the contrary, for they are régimes firmly based upon the analogy of the orthodox law of the high seas, problems of jurisdiction being solved mainly by the application of the nationality principle. Indeed the law of the sea has yet to find an adequate solution even for the relatively simple problem of providing some status for an international flag such as the flag of the United Nations. It may well be that radical changes in the law of the high seas, and of the seas generally, are desirable; but it will not assist their realisation to underestimate the novelty of creating any kind of quasi-territorial jurisdiction and control for an international institution, and the very broad spectrum of consenting states that would therefore be needed to launch such a change.

At the same time it is very clear that something needs to be done about the present law of the sea, which is quite unequal to the problems of social ordering that confront the international community today. It is no doubt true that a legal system that is defined in terms of "freedoms" is not easily to be transformed into a system of government and regulation of the kind that may be needed. But a problem is not disposed of by showing merely that its solution may prove to be more difficult than might at first sight appear. It is reasonable, therefore, to ask what modifications and changes might be brought about through the medium of national jurisdiction regulated by international law—the traditional means of developing international law—not necessarily as an alternative to the creation of direct jurisdiction for international agencies, but possibly as a complement to such a development. In particular, it is worth asking the question whether the already existing tendency to augment coastal state jurisdiction—a tendency partly at least created by the pressure of modern problems which the orthodox law has failed to solve—could not itself be harnessed to help cope with the new situation.

The coastal state as an international agent

Monism and dualism are labels which have sometimes been used to describe rival theories about the proper relationship of international law and the internal law of the state. The fact is, however, that they represent two different but complementary, rather

than alternative, methods of making international law work. International law can be applied and enforced directly, or it can, and usually is, applied through the administrative machinery of the state; whether directly as international law or transformed into municipal law is usually of little practical moment. The international law of the high seas has been, in the classical system, mediated and applied largely through the flag jurisdiction; the international law which is applicable in the territorial sea is applied, or should be applied, both by the coastal state jurisdiction and the flag jurisdiction. A practical question therefore, is whether the augmented part now played by coastal state jurisdiction on the high seas can usefully be harnessed to the purposes of international law.

It is instructive to consider these questions in the light of recent attempts to do something about the vexing problem of pollution of the seas by oil; a problem which is one for the whole international community, yet at the same time usually especially threatens the coast or coastal waters of a particular state. Moreover, this is a problem which affects a very wide spectrum of jurisdiction and law. It cannot be controlled by a simple injunction "thou shalt not pollute the sea." It may require, for instance, detailed regulation of navigation methods, or skills, or instrumentation; or it may require regulation of specifications for contracts for the construction of tankers; and a host of other matters may come within the purview of a realistic attempt to cope with the problem, nearly all of them matters which by traditional law are within the jurisdiction of the flag state and not of the coastal state.

Moreover, the problem of sea pollution is a near relation of the problem of conservation of resources, which again has been at the core of much of the extension of national jurisdiction of the coastal state; and indeed the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas in Article 6 recognised that "a coastal state has a special interest in the maintenance of the productivity of the living resources of the high seas adjacent to its territorial sea."

In relation to oil pollution from accidents on the high seas, an international convention has already sanctioned the use of coastal state jurisdiction as a control agency. The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (the so-called "public law convention"), provided that states parties to it

. . . may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime

casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.

This right is, of course, hedged with various safeguards. The flag state must be consulted where possible. In any event the measures must be notified to the International Maritime Consultative Organisation; and so on. But the important point for the present discussion is that all this amounts to more than a sanctioning of a measure of self-help by the coastal state on the high seas; it is a way of using the coastal state as an agent of international regulation and policy.

The most radical recent development, however, in relation to pollution has been the unilateral action of the Canadian Government taken in the Arctic Waters Pollution Act of 1970,¹⁷ by which jurisdiction to make and enforce measures against pollution of the sea was established up to a distance of 100 miles from every point of the Canadian coast north of the sixtieth parallel. In the pollution zones thus defined the Canadian Government took powers to control all shipping, to prescribe standards for the construction of vessels exercising a right of passage, standards of navigation and operation; and indeed to prohibit, if deemed necessary, the passage of vessels in those waters. These are very wide powers, though perhaps hardly wider than are necessary to cope with the dangers of oil pollution in frigid waters; nevertheless, the enactment is not founded upon a claim to sovereign competence in respect of those waters, for a parallel enactment limited the territorial sea at twelve miles. On the other hand it is a novel and far-reaching invasion of the rights of flag states on the high seas: though this may seem a logical answer to the questions precipitated by the voyage of the 115,000-ton United States tanker S.S. *Manhattan* through the ice-bound Arctic seas in the summer of 1969; a voyage intended to demonstrate the feasibility of using ice-breaker, super-tankers on the direct route between the new Alaskan oil fields and the United States eastern seaboard markets, but which had the unintended effect of bringing the dangers of oil pollution urgently and dramatically to the attention of the Canadian Government.

Admittedly this remarkable invasion of established principles governing jurisdiction on the high seas might be explained away on the basis of the peculiar problems of frigid waters, where "owing to the minute rate of hydrocarbon decomposition . . . the presence of any such oil must be regarded as permanent," and where "the disastrous consequences which the presence would have upon the marine plankton, upon the process of oxygenation in Arctic North

¹⁷ For a very helpful treatment, see Richard B. Bilder in (1970) 69 *Michigan Law Review* 1-54.

America, and upon other natural and vital processes of the biosphere, are incalculable in their extent.”¹⁸

But though difficulties peculiar to the region may have lent special urgency to the situation, the fact is that Canadian spokesmen have set their apologies for this enactment in a more general context. Whilst acknowledging that “our pollution legislation is without question at the outer limits of international law,” the Prime Minister added: “We are pressing against the frontier in an effort to assist in the development of principles for the protection of every human being on this planet.” It was for this reason, he said, that Canada had amended her declaration of acceptance of the compulsory jurisdiction of the International Court of Justice so as to exclude the calling in question of these measures:

Involved here is not simply a matter of Canada losing a case in the World Court. . . . What is involved, rather, is the very grave risk that the World Court would find itself obliged to find that coastal states cannot take steps to prevent pollution. Such a legalistic decision would set back immeasurably the development of law in this critical area.

Thus it was made clear that the hope was that the Canadian enactment would be seen as an application of new principles of quite general validity.

An even broader view was taken by Mr. Beesley, the Canadian legal adviser and chief delegate at the meetings in the summer of 1971 of the United Nations enlarged deep sea committee, which had been given the task of preparing the ground for the proposed maritime law conference in 1973.¹⁹

Mr. Beesley, no doubt having in mind that one form of defence is to attack, vigorously criticised the principle of flag jurisdiction on the high seas—a roving jurisdiction he called it—which had, he said, become “a licence to pollute and a right to overfish,” thus marshalling to his thesis both the anti-pollution and conservation lobbies in one sentence. Accordingly, he went on, coastal states should have “the clear right and responsibility to prohibit any ships that did not conform to required safety standards from crossing their territorial sea.” Two interesting points may be noticed here. First, the high seas problem is immediately linked with that of passage

¹⁸ Address by the Canadian Prime Minister, the Right Honourable Pierre Elliott Trudeau, to the Annual Meeting of the Canadian Press in Toronto on 15 April 1970; statement supplied by the Office of the High Commissioner for Canada in London.

¹⁹ The cumbersome full title of the committee is the “Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction.” Mr. Beesley spoke on a number of occasions during these meetings but his main contribution to the general debate will be found in A/AC.138/SR.63.

through the territorial sea; and, secondly, the idea of a right of the coastal state is in the same moment linked with the idea of the responsibility of the coastal state to the international community generally: thus, the right of the coastal state to defend its own shores and territorial sea is made part and parcel of its responsibility, stemming from its proximity to the danger, to the international community to prevent pollution of the high seas. This suggestive linking of right and duty Mr. Beesley calls the principle of "custodianship": a custodianship which apparently extended not only to the territorial sea but also to the proximate high seas.²⁰

If this idea of the custodianship of the coastal state is to become a legal principle and not just an idea it will need to find its justification not only in the reason of the thing but also in received international law. Thus, if a coastal state is to have a right to exercise its jurisdiction on the high seas in matters which have hitherto been subject only to the flag jurisdiction, it will be necessary to evolve rules of international law which define with some precision both where and in what circumstances and for what purposes such jurisdictional intervention by the coastal state is justifiable. Such rules may develop through treaties (as in the "public law" treaty on oil spill accidents mentioned above), or through state practice, or in both ways. The impetus for developing state practice could quite well come through the unilateral action of a state "going to the frontiers of the law," even though initially that statement comes as near to an admission of illegality as may be.

But if the idea of custodianship may have more to do with the law of the future than with the *lex lata*, yet it should not be forgotten that there are not wanting precedents according to which, in certain defined circumstances, the jurisdiction of the coastal state may be extended extra-territorially into the high seas, in some degree at least supplanting the flag jurisdiction there. The obvious and probably the most ancient example is the right of hot pursuit.²¹ There were the English so-called Hovering Acts.²² There is a great deal of material to be found in the jurisprudence of United States

²⁰ The distinction in the particular case of the Canadian Arctic waters is not always as clear as might be wished. Canada appears sometimes, though by no means consistently, to be suggesting that the Arctic pollution zone waters are in any case Canadian waters or at least could be regarded as such. See, e.g., the material in Bilder, *op. cit.* at p. 12.

In elaborating the idea of custodianship, Mr. Beesley also referred to the *Trail Smelter Case*; but of course that slight and much overworked decision concerned the duty owed to a territorial neighbour and not a duty owed either to oneself or to mankind in general.

²¹ See Article 23 of the Geneva Convention on the High Seas.

²² See Colombos, *The International Law of the Sea* (6th ed., 1967), pp. 137-146, for examples of such legislation in several countries.

courts during "prohibition."²³ A recent example of the recognition of such a right in a treaty is provided by the European Agreement for the Prevention of Broadcasts Transmitted from outside National Territories.²⁴ All these precedents, however—and many others could be found—are to do really with the more efficient enforcement of state internal laws for the benefit of the territory concerned. There is little or no element of custodianship for the international community except in a somewhat remote sense. This does not of course weaken the case for a custodianship jurisdiction in the coastal state but rather makes it an *a fortiori* case.

There is, however, a further point of some importance about the idea of "custodianship" of the coastal state, and that is that there is no reason why it should be confined to qualifying the powers of the coastal state on the high seas: it would logically apply with equal force in qualifying the powers of the coastal state in respect of its territorial waters. Again there would be nothing new here. International law normally operates over states in respect of the law applied in their own sovereign territory. The international law concerning sovereign and diplomatic immunities and privileges is perhaps the oldest example of such a kind of international law. Moreover it will be remembered that Mr. Beesley clearly connects high seas and territorial seas in regard to the pollution problem. But there is no reason why it should be confined to the pollution problem. There is a sense in which the coastal state can already be said to be a custodian of its territorial sea or straits in ensuring the right of innocent passage to the vessels of all nations. Thus the custodianship idea may be called in to strengthen existing international law as well as suggesting the direction of the law for the future.

Admittedly there is a consideration which here immediately gives pause: for the central problem posed by the Canadian *démarche* is precisely the conflict between the new Canadian pollution legislation and the international right of innocent passage through the territorial sea as well as through the high seas. But then the principal function of the main stream of the international law of peace is to provide a balance and an adjustment between conflicting interests of states. What is required, therefore, is a system of rules internationally accepted whereby the "custodianship" of the coastal state in the exercise of its jurisdiction may be controlled so as to take proper account of both the international interest in having oil pollution at sea prevented and in seeing that passage on

²³ e.g., *The Grace and Ruby* [1922] 283 Fed. 475.

²⁴ United Kingdom Treaty Series, No. 1 of 1968.

the sea, whether on the high seas or in territorial waters, is not unjustifiably prevented or hindered.

This brings us to a further possible development. A law of the sea which is sufficiently elaborate to deal with the often highly technical problems of the present time, cannot be left simply to the haphazard incidence of the traditional remedies, in which the sanction of the law depended largely upon the outcome of complaints or actions in delict between states themselves. For these modern problems are not primarily questions of private law soluble by actions for compensation, but rather questions of public order. The proper administration of such a law may need inspections, patrols, expert assessments, advice, reports and so on. In short it would require to be administered, and perhaps also amended, through some kind of international organisation or agency.

Certainly it would be possible for such an international organisation, as has been mentioned above, to have some degree of direct jurisdiction and control over persons in some area of the high seas and for defined purposes, provided the necessary agreement were forthcoming from states. But the point that is being made here is that such an organisation, or organisations, could also, or instead, administer a set of laws in the classical way, through states and could probably do so with great effect. Moreover—and this is of the greatest importance—an international organisation could in this fashion exercise the requisite kind and degree of control in territorial and even in internal waters as well as on the high seas. This is important precisely because so many of the present-day problems, such as pollution, though that is by no means the only one, are problems which can only be dealt with effectively by a system of laws that knows no frontiers. Other examples that immediately come to mind are the freedom of navigation and the conservation of resources and food stocks.

The possibility of using the coastal state as an agent of the international community is not a new one: on the contrary it is simply to apply to this situation the traditional mode by which international law has been made to work. But many different variations on the theme are possible. One somewhat extreme example would be that found in the trusteeship proposals of the United States draft treaty on sea-bed²⁵; under this proposal, however, the coastal state, before it can be trustee of the sea-bed off its shores, has to renounce any right or claim to "sovereign rights" over that area. This therefore would not be a custodianship by the coastal state of its own proper rights for the benefit of the inter-

²⁵ See the article by Dr. Bowett on p. 50.

national community, but a trusteeship in respect of rights that have first been renounced in perpetuity and henceforth, therefore, exist only for the purposes of the trust. Whatever usefulness this may have in relation to the resources of part of the sea-bed, this device clearly has no usefulness in relation to problems such as that of securing rights of passage through territorial and internal waters, and through international straits. At any rate it is clear that the notion of trusteeship as applied in the United States draft treaty has little or nothing to do with the notion of custodianship suggested by Mr. Beesley, and it is important not to confuse these quite different devices for the administration and enforcement of international law.

It should perhaps be added, lest the point be forgotten, that there is no reason why custodianship should be a function merely of the coastal state. Indeed, there is a much older tradition of regarding the flag state as exercising jurisdiction at least in some measure as a custodian of the international community; and it is on this basis that the police powers of warships has always been recognised and accepted as part of the international law of the sea. It follows that an allegation that the coastal state is acting as a custodian for the international community cannot in principle give it any priority over the flag jurisdiction in any case where the act of the coastal state is an invasion of the jurisdictional prerogatives of the flag state. To be more specific, the plea that a coastal state is acting in the interests of mankind in attempting to prevent oil pollution off its shores is not in principle of a higher priority than the plea of a flag state that it is acting also in the interests of mankind in protecting the right of passage whether on the high seas or through territorial waters; indeed in principle it is passage which has priority because it rests upon law which is as firmly established as any in the book, whereas the coastal state intervention is admitted to go at least to the frontiers of the law. Custodianship therefore is no legal shibboleth making lawful that which would otherwise be unlawful. In fact, valuable as it is as a suggestive idea for the making of new law, it will remain ambivalent in application unless and until it can be embodied in actual rules of law established on a functional basis. What is needed, whether in the form of treaty or otherwise, is quite a lot of hard, black-letter law. The illustrative example that comes to mind is the question how far it should be permissible to lay down the building specification of vessels entitled to exercise rights of passage. This is not only a highly technical matter; it is also a highly charged political question, for such specifications may have highly discriminatory effect between both building and operating countries. It is also a matter upon which even technical opinions may differ and where regulations may need

constant revision in the light of experience. Thus custodianship here means little or nothing until there exist detailed internationally agreed regulations to which it can be harnessed and which could also, incidentally, have the effect of bringing flag jurisdiction and coastal state jurisdiction into double harness instead of having them pull in different directions.

Conclusions

The matter may perhaps be summed up in this way. The most urgent and important problems impinging upon the law of the sea today are ones that know no frontiers: pollution, conservation, food supplies and navigation, to take only the obvious ones. Hence they are not going to be solved merely by the creation of international agencies operating beyond the area of national jurisdiction; for it is in the areas subject to national jurisdiction in one form or another where the ameliorating influence of international law must find its more important role.

Fortunately, however, the traditional structure of the international law of the sea, though knowing many boundaries and limits, and disputes over their location, is also essentially an integrated system. The exemplar is the integration of the oldest of the principles, the freedom of navigation, which depends not only upon the "freedom" of navigation on the high seas but equally upon the complementary "right" of innocent passage in the territorial sea. And just as free navigation was thus secured in the classical law, so also problems such as that of the control of pollution can only be solved by realising and using the international maritime law as an integrated system.

This offers the possibility of a more constructive approach to the phenomenon of "creeping national jurisdiction." The extension of national jurisdiction is something that has already happened on quite a large scale. It is useless to try to reverse that trend at a time when a dominant influence in the international community is bound to be that of a large body of new national states inevitably concerned about their own sovereignty. The right approach is surely rather to accept the fact of extended national jurisdiction and to harness it to the purposes of international law and regulation for the general benefit. Indeed, to some extent at least, "creeping national jurisdiction" on a functional basis has been helping to bring about that elaboration of international sea law that modern problems of ordering require of it.

Thus the decision of the General Assembly of the United Nations to ask a future law of the sea conference to consider a very broad spectrum of sea law was probably right in principle; though no doubt

there are practical difficulties and dangers. For the international sea law of the future, if it is to be adequate to deal with problems already with us, will be as much concerned with the régime of internal waters, territorial sea and territorial straits, as with any so-called area "beyond national jurisdiction."



DEEP SEA-BED RESOURCES: A MAJOR CHALLENGE

D. W. BOWETT

THERE is no novelty in the idea that technology presents a continuing challenge to Society in terms of the decisions which must be taken over the use and control of new developments and, indirectly, to the legal system which must acquire and apply the techniques of control desired by Society. However, there is novelty in the sheer pace at which technology is presenting this challenge to international society in relation to the exploitation of the resources of the sea. Within little more than a decade after the great U.N. Geneva Conferences on the Law of the Sea of 1958 and 1960—which introduced substantial codification—a general demand for revision of the law has led to plans for a new Conference on the Law of the Sea in 1973.¹ The scope of the proposed conference is extremely wide² and it is the purpose of this article to examine only one of the proposed topics, namely, the “international sea-bed area.” This is a topic which is currently exciting interest throughout the world, in Parliaments,³ Foreign Offices, Universities, learned societies, conferences, oil companies and even the popular press (the order does not indicate a hierarchy of influence). Behind this interest there lies, of course, money and—possibly a countervailing pressure—the increasing concern with the protection of the maritime environment in addition to the normal considerations of prestige, military security and national interest which condition any State’s approach to questions of maritime jurisdiction. In order to appreciate the extent of this interest some brief mention should be made of the resources currently estimated to lie in or on the sea-bed outside national jurisdiction.

¹ General Assembly resolution 2750 C (XXV) of 17 December 1970 decided by a vote of 108 to 7 with 6 abstentions to convene such a conference.

² This resolution provides that: “The Conference would deal with a precise definition of the international sea-bed area; the regimes of the high seas, the continental shelf, the territorial sea (including its breadth and the international straits) and contiguous zone; fishing and conservation of the living resources of the high seas (including the preferential rights of coastal States); and the preservation of the marine environment, including the prevention of pollution; and scientific research.”

³ See H.L. Deb., 25 November 1970, cols. 152-228 for a useful and comprehensive debate.

Estimated Resources

If one takes the 200-metre isobath as the outer limit of *national* jurisdiction (which, strictly, for reasons we shall explain, one cannot do) the area beyond is known to contain extremely large quantities of minerals. But reliable estimates are not possible simply because not enough is known about the sea-bed. The principal resources are likely to be the following:

Petroleum and Gas. The extent of deposits on the continental shelf suggests that appreciable reserves are present at least as far as the foot of the continental terrace or slope ⁴ (see diagram).

Phosphorites. Used mainly as a fertiliser and found as nodules in sands, muds and semi-consolidated tertiary bedrock down to depths of 3,500 metres. Companies are already taking exploration leases ⁵ although no commercial production is in progress yet.

Metalliferous Brines. Occur in deep waters (2,000 metres) and contain zinc, silver, lead, tin and gold. Little is known of their location except that sites in the Red Sea have been identified and companies have expressed interest.

Manganese Nodules. Occur mainly at 1,500 metres and below, with variable metallic content (*i.e.*, may also contain cobalt, nickel and copper) and potentially highly valuable ⁶ as well as being recoverable by fairly elementary dredging techniques since they are surface (sea-bed) deposits.

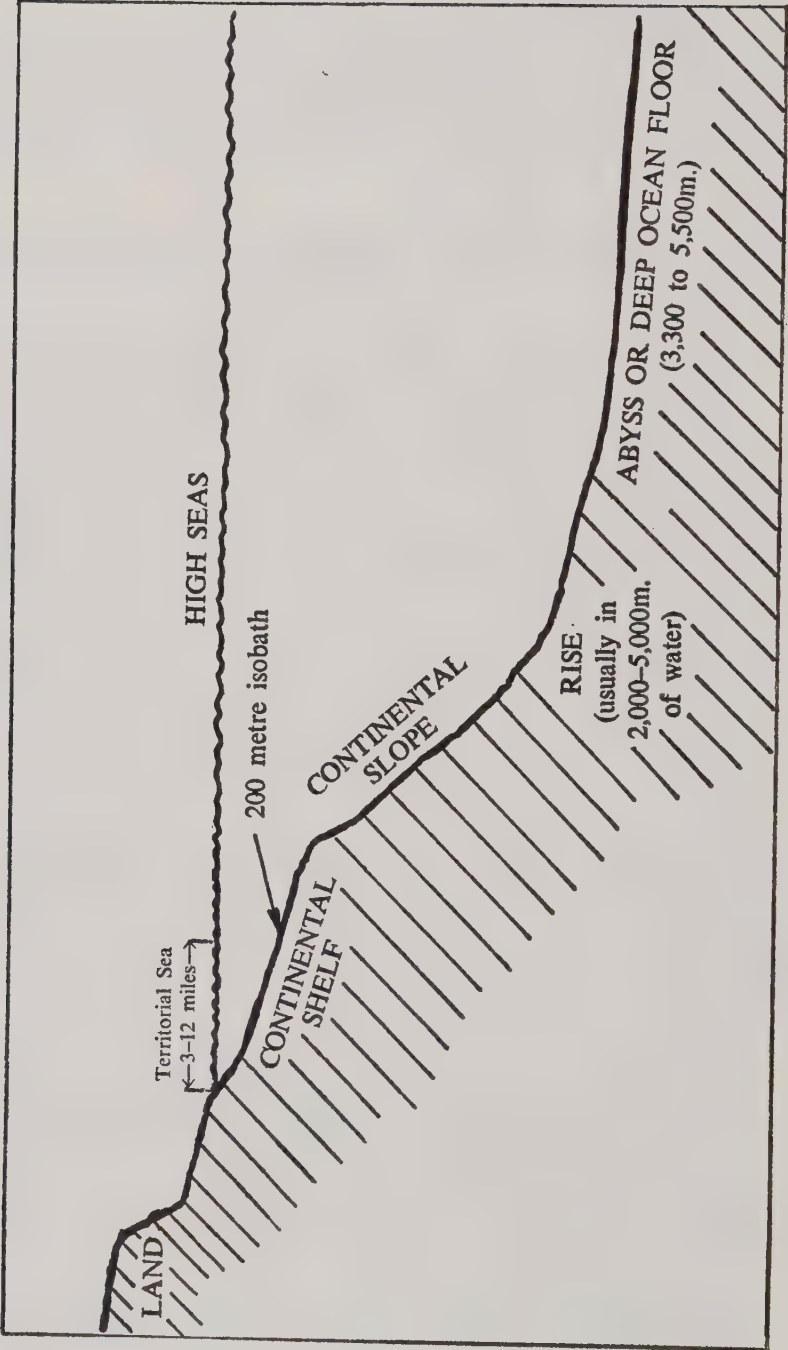
These resources, whatever their actual volume, cannot be looked upon as recoverable wealth in the abstract. Their availability will in practice depend upon (a) technological developments permitting recovery and (b) favourable cost analysis in relation to the costs of similar deposits available on land or within waters subject to national jurisdiction.⁷ The probability is, therefore, that oil and

⁴ See *Joint Report of the Section of International and Comparative Law, the Section of Natural Resources Law, and of the Standing Committee on World Order under Law of the American Bar Association*, August 1969, pp. 5-6.

⁵ Leases have been taken off San Diego, California; on the Australian continental shelf and on the Chatham Rise about 200 miles east of New Zealand: see Christy, "Marigenous Minerals: Wealth, Regimes and Factors of decision" in *Symposium on the International Regime of the Sea-Bed: Proceedings* (1970), 113 at pp. 119-120.

⁶ Mero, *The Mineral Resources of the Sea* (1965), pp. 174, 225-230; Sorensen and Mead, "A Cost-Benefit Analysis of Ocean Mineral Resource Development: the Case of Manganese Nodules" (1968) 50 *American Journal of Agricultural Economics*, pp. 1611-1620.

⁷ For example, Christy, *loc. cit.*, p. 115, estimates gold in sea-water to be equivalent to 5 million tons, worth \$5 trillion, but regards the recovery of such deposits as totally uneconomic. For a useful and detailed summary of resources, see also Christy, "Economic Problems and Prospects for Exploration



gas exploration on the Continental Slope will come first, within the very near future, with phosphorite nodules and manganese nodules following; but commercial exploitation, at least of the metalliferous resources, may well be a decade or more away. This being said, there is nonetheless a reasonable certainty that in the future there will be widespread exploitation of these resources and the profits will be enormous. It is for this reason that the problem is presently acute, since a legal régime *must* be established before serious exploration and exploitation can begin. The costs are high and security of tenure is essential for any commercial concern wishing to acquire a licence to prospect: this presupposes an established legal régime.

The problem now facing international society has three components: first, the question of the limits of national jurisdiction; second, the nature of the régime for the deep sea-bed, *i.e.*, the area beyond national limits; and, third, the nature of the institutional forms to be established for the purposes of administering and supervising the régime. It is to these three basic issues that we now turn.

The limits of National Jurisdiction

Since we are primarily concerned with the area *beyond the limits of national jurisdiction* it is important to define those limits. Unhappily, the definition adopted in the 1958 Geneva Convention on the Continental Shelf lacks precision. Article 1 of that Convention states that:

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the national resources of the said areas. . . .

Clearly, the "exploitability" criterion—however justifiable in the 1958 context of a search for a limit to national jurisdiction which would not artificially tie such limit to the technological capacity of submarine oil-drills at that time—makes precision impossible. Even if it be argued that the areas must be "adjacent" to the coast, it cannot be said that this test of adjacency adds very much precision to the limit. Goldie takes a restrictive view of these criteria: his conclusion being that "the intention of the Convention's framers was to limit the continental shelf area to little more, at the most, than the

of the Resources of the Sea-Bed and its subsoil" in *Proceedings of the Symposium on the Exploration and Exploitation of the Sea-bed and its subsoil*, The Council of Europe, Strasbourg, 3-5 December 1970.

zone enclosed by the two hundred metre bathymetric contour line.”⁸ Jennings⁹ takes the more liberal view that the national jurisdiction comprises the shelf, the slope and possibly the rise. He bases this view on the Judgment of the I.C.J. in the *North Sea Cases*¹⁰ in which, as a matter of customary law,¹¹ the International Court viewed the coastal State’s rights as extending over “the area of continental shelf that constitutes a natural prolongation of its land territory.”¹² Jennings argues that the slope is geologically one with the shelf, and possibly the rise, too, so that it may be considered a part of the natural prolongation of the land territory. He would further argue that, since there must be a certain correspondence between customary law and Article 1 of the Convention, similar reasoning applies to the construction of the definition of Article 1 and that, therefore, the notion of “adjacency” is comprised within that of geological appurtenance. The British Branch Committee on Deep Sea Mining of the International Law Association agreed with this view.¹³ Similarly, the Joint Report of the American Bar Association¹⁴ regards the present rights of the coastal State as extending to the foot of the Slope (*i.e.* the rise). The present practice of the U.S.A. appears to coincide with this extensive interpretation.¹⁵

Whatever be the correct interpretation of Article 1, it seems inevitable that any new régime to cover the deep sea-bed would have to be concluded by treaty and would have to fix a *precise* limit to national jurisdiction so as to demarcate the areas subject to national jurisdiction from those subject to the new régime. Thus, more important, perhaps, than the question of the correct interpretation of Article 1 is the policy question of what should be the new agreed limit.

Here the recent (August, 1970) United States proposals,¹⁶ some-

⁸ Goldie, “The Exploitability *Test—Interpretation and Potentialities” (1968) 8 *Natural Resources Journal*, 434 at p. 448.

⁹ Jennings, R. Y., “The limits of Continental Shelf Jurisdiction: some possible implications of the North Sea Case Judgment” (1969) 18 *I.C.L.Q.* 819. But see Johnson, “The North Sea Continental Shelf Cases” (1969) 3 *International Relations* 522, for a more restrictive interpretation of the Judgment of the I.C.J.

¹⁰ 1969 *I.C.J. Reports* 3.

¹¹ It must be remembered that, since W. Germany was not a party to the 1958 Convention, the Court was applying principles of general, customary law.

¹² *Ibid.*, p. 22.

¹³ *Report on a Régime for the Exploration and Exploitation of the Mineral Resources of the Ocean Bed* (1970), Annex I.

¹⁴ *Supra*, n. 4, p. 36.

¹⁵ See Krueger, “Mineral Development on the Continental Shelf and Beyond” (1967) *California State Bar Journal*, 515 at pp. 521–522, who reports the grant of licences by the Department of the Interior or other assertion of jurisdiction over the Cortes Bank (120 miles south-east of San Diego, with most areas deeper than 200 metres) and off Florida in areas where the depth ranges from 650 to 5,000 feet and which lie as far as 300 miles offshore.

¹⁶ Text in *Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the limits of National Jurisdiction* G.A.O.R., 25th Session, Suppl. No. 21, A/8021, Annex V; also in 9 *Int. Legal Materials* (1970) No. 5, 1046. For a general commentary on the U.S. proposals see Auburn, “The International Seabed Area” 20 *I.C.L.Q.* (1971), 173–194.

times called the "Nixon" proposals, submitted to the U.N. Seabed Committee are of vital interest: they propose a restriction of the continental shelf area subject to national jurisdiction to the 200-metre isobath. *Prima facie*¹⁷ this appears to be a remarkably generous offer by the U.S.A. to surrender areas beyond that limit, but presently claimed or claimable by the U.S.A. by virtue of the "exploitability" test. Indeed, perhaps because of its generosity, it has been attacked as detrimental to American interests by the American Bar Association¹⁸: the labels used were "retrogressive, impractical, and not in the best interests of the United States." The United Kingdom Working Paper, also presented to the U.N. Seabed Committee in August 1970,¹⁹ is completely non-committal and contents itself with the statement of the obvious that "when the régime eventually comes into force, the international community must know to what area it applies."

Other suggestions for a limit have been made in terms of a distance from the shore rather than a depth of water line: the Borgese proposals would limit the national jurisdiction to the limit of territorial waters²⁰ (assuming this could be agreed at 12 miles) and Latin-American writers have suggested the 200-mile limit which Chile, Peru and Ecuador have for many years proclaimed as the limit of their "epicontinental sea." Whilst 200 miles may be excessive, the present writer tends to share the view that a distance limit would be simpler than a depth limit, even though it does move right away from the earlier concept of the shelf as the geological appurtenance to the land-mass.

Assuming, as we must, that a new treaty will establish an agreed demarcation line between the sea-bed under national jurisdiction and the *international* sea-bed area (to use the term suggested by the U.S.A.), two problems remain, directly related to this issue.

First, will uncertainty about the future demarcation line inhibit exploration and exploitation pending agreement and what can be done with concessions granted by States in areas which ultimately prove to be *outside* the national jurisdiction? The detailed U.S. proposals tackle these difficulties by suggesting that any licences granted in the interim beyond the 200-metre limit should be granted subject to any

¹⁷ *Prima facie* because the true significance of the offer has to be read in conjunction with the U.S. proposal for an intermediate "trusteeship" zone beyond the 200-metre isobath: see *post*, p. 60.

¹⁸ *Joint Report*, etc., cited note 4 above, at pp. 56-57.

¹⁹ A/AC.138/26, 5 August 1970.

²⁰ Elisabeth Mann Borgese, *The Ocean Regime: a suggested statute for the peaceful uses of the High Seas and the Seabed beyond the limits of National Jurisdiction* (1968), published by the Center for the Study of Democratic Institutions; and see also her "Reflections on *Pacem in Maribus*" in *Proceedings: Pacem in Maribus Convocation*, Malta, June-July 1970, p. 115.

new régime agreed upon, that the grantor State should undertake either to renew the licences (if within the "trusteeship" area) or sponsor the application for a new licence to the International Seabed Resource Authority (if in the international sea-bed area) and compensate the licensee for any investment losses resulting from the application of this Convention.²¹ The American Bar Association suggests that private investment will nevertheless be discouraged by this degree of uncertainty.²²

Second, what will be the position of States who are not prepared to accept the new treaty régime for the sea-bed? In principle, since such States have existing, inherent rights to their continental shelves, they are entitled to an area beyond the 200-metre isobath subject to the existing tests of "adjacency" and "exploitability." Equally, in principle, they cannot be deprived of their existing rights by a treaty to which they are not parties.²³ There simply cannot be an area which the coastal State regards as within its exclusive, sovereign jurisdiction and which the new International Sea-bed Agency regards as part of the international sea-bed area and therefore open to all States subject to the agreed licensing system: the result would be chaotic. This is a problem which the U.S. proposals do not squarely face. Article 2 simply asserts that "No State may claim or exercise sovereignty or sovereign rights over any part of the International Sea-bed Area or its resources. Each Contracting Party agrees not to recognise any such claim or exercise of sovereignty or sovereign rights." This suggests that the proposed Convention is to have a legislative effect, because the contrast between "State" and "Contracting Party" is surely intentional. However, there is no basis for suggesting that Contracting Parties can, by this means, deprive non-Contracting Parties of their existing rights. What may well happen is that the new International Sea-bed Agency will negotiate with any non-Contracting Party an agreed boundary between the national and the international areas at the time the new régime enters into force. The non-Contracting Party will therefore take full advantage of its rights beyond the 200-metre limit but will, as it were, accept that the boundary is to be fixed by reference to the "exploitability" of the shelf at that particular moment in time.

²¹ U.S. Draft Convention, Article 73. It should also be noted that, in an attempt to minimise this problem, the General Assembly in December 1969 called for a moratorium on all exploitation beyond the limits of national jurisdiction. This is perhaps unrealistic. A more practical idea in a recent, as yet unpublished, article by John Laglin suggests that States pass parallel legislation forbidding all persons subject to their jurisdiction from exploiting the deep sea-bed except under licence and requiring such persons to respect licences granted by other States. These interim licences would all contain agreed conditions.

²² *Loc. cit.*, p. 57.

²³ See Article 34 of the Vienna Convention on Treaties: "A treaty does not create either obligations or rights for a third State without its consent."

The régime for the international sea-bed area

There appears to be general agreement that any new régime will come into effect by treaty. Certain other general principles have emerged and are reflected in the Declaration of Principles contained in General Assembly resolution 2749 (XXV), adopted on 17 December 1970 by 108 votes to none, with 14 abstentions. These are the following.

- (i) *The sea-bed and its resources are to be "the common heritage of mankind"*²⁴

This approach is entirely consistent with the traditional approach to the High Seas as *res communis*, open to both coastal and landlocked States. The practical problem, however, is to decide how this "common heritage" can be enjoyed by all States without resulting in complete anarchy. Obviously, a system of sharing is required, which necessarily involves licensing. This, in turn, involves questions of which authority grants the licences, to whom they may be granted, on what terms and to whom the licence fees and production royalties are payable.

(a) *A licensing system*

Under the U.S. proposals it will be for the new International Sea-bed Authority to grant licences in the area beyond the trusteeship area; the Authority becomes more than a mere registration authority but not an operational agency.²⁵ These proposals contain very detailed rules on the operation of a licensing system²⁶ and entrust the Authority with the role of granting and supervising licences. The proposals of the British branch of the I.L.A. view the matter differently, since the Authority will, under those proposals, merely register the claims of States to blocks (defined areas of the sea-bed) and the States will then license operations within their respective

²⁴ The full text of the relevant paragraphs reads:

"1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international régime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established."

²⁵ These two possible roles were explored in the U.N. Secretariat *Study on International Machinery*, 26 May 1970 (A/AC.138/23). And see an earlier Report by the Secretary-General in A/7622, Annex II.

²⁶ A/8021, Annex V, Appendices A, B and C.

blocks. But whether the licences are granted by the Authority or by States there appears to be general agreement that different kinds of licences will be granted according to the stage of development, *i.e.*, broad reconnaissance exploration, detailed exploration involving deep drilling and evaluation, and exploration.²⁷ Again it is suggested that these licences may cover either all minerals or only particular minerals.²⁸

Whether one chooses the method of the Authority granting or assigning licences directly to operators, or the method of registering State claims to blocks there are acute difficulties in dealing with competing claims. The U.N. Economic and Technical Sub-Committee identified the following possibilities:

- (a) Registration of claims or tracts on a first-come, first-served basis;
- (b) Selection among applicants by lottery;
- (c) Assignment by the administering authority on the basis of its judgment of the merits of the applicant;
- (d) Assignment to the highest bidder in an auction. . . .²⁹

Assuming that the applicants are States, methods (a) and (d) give enormous advantage to the rich, technologically-advanced States, which runs directly contrary to the wish of many States that the less-developed should be allowed to participate.³⁰ Method (b) is, by definition, a haphazard method and not necessarily conducive to an efficient development of the resources; it has been referred to as "international bingo" and, clearly, it affords no certainty that the small States will be allocated blocks with worth-while resources. Method (c) confers a degree of power to the administering authority which would be unacceptable to many States. The U.S. Draft Convention adopts the approach of "first-come, first-served," with an auction procedure to resolve the problem of multiple applications for the same area or block.³¹

It is this fear of promoting inter-State rivalry in competition for licences or claims, coupled with concern for the less-developed States, which forms the major argument of those who would prefer

²⁷ See Interim Report of the Economic and Technical Sub-Committee of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, A/AC.138/SC.2/L.6, 24 March 1970, pp. 2-7; also in A/8021, Annex II.

²⁸ The British Branch Committee of the I.L.A. (*supra*, note 13) suggests a distinction between three categories: (i) oil and gas, sulphur, saline minerals, (ii) manganese nodules and similar superficial deposits and (iii) other minerals requiring mining.

²⁹ A/AC.138/SC.2/L.6, para. 8.

³⁰ See the emphasis on this in para. 7 of the Declaration of Principles adopted by the General Assembly on 17 December 1970.

³¹ *Loc. cit.*, Appendix B.

that the international authority should itself either conduct operations or license operating companies direct.³² Certainly if different States secured licences for different minerals or resources in the same area we should get a multiplicity of systems of control and jurisdiction which would be likely to produce inter-State disputes. The argument of the "internationalists" is, therefore, that the whole idea of a grid system, with blocks being awarded to States, is unrealistic and potentially chaotic: better, therefore, to allow the international authority to control the whole area and itself develop the resources or license companies direct. The idea of licences being issued directly to companies, rather than to States or to companies via a "sponsoring" State (as in the U.S. proposals), merits closer study than it has received. The rejection of this idea tends to be based upon the trite statement that "only States are proper subjects of international law" and that States must bear responsibility for the companies they are sponsoring.³³ However, if States are the only applicants, they will ultimately, for the most part, assign their licences to companies so that the operator will usually be a company. And if companies are respectable enough as licensees on the Continental Shelf, why not on the Deep-Sea Bed? So far as responsibility for mishaps, pollution or other breaches of licence is concerned, the international companies are frequently better endowed in terms of their financial resources, and more easily sued, than many States. In any event, a system of insurance would be a wise precaution to guard against major mishaps.³⁴ The other reason given for insisting on States as applicants for licences is that this will give the small States an opportunity for sharing in the "common heritage." Yet, since their concern is mainly for a fair economic share, this could more easily be achieved by the international authority allocating to the underdeveloped States a fair share of the profits and without burdening these States with the responsibilities of supervising licences which they would grant to international companies in their areas or blocks. Indeed, it is by no means clear that some of the smaller States are capable of undertaking this supervision.

³² See H.L.DeB., 25 November 1970, The Lord Bishop of Norwich (Col. 139) and Lord Ritchie-Calder (Col. 186).

³³ *Ibid.*, Earl Jellicoe (Col. 173). The emphasis on States as the proper applicants for licences is very plain in the U.K. Working Paper, para. 3 and also in the Soviet proposals (A/AC.138/SC.2/L.6), paras. 1, 5, 6. There would doubtless be Soviet opposition to the idea of licensing companies direct and Soviet participation in any new ocean-bed régime is essential. However, it may be that the Soviet Union would accept such an idea if State agencies could be treated as applicants on the same footing as private companies.

³⁴ And note the Secretariat's proposal for a part of the profits from production royalties to be allocated to a reserve fund to combat or compensate for damage to the environment: A/802, Annex IV, para. 12.

This brings us to the final problem, namely, how the profits are to be allocated. The U.S. proposals do not envisage substantial profits at the exploration stage: indeed, licence fees are fairly minimal and designed to cover only the management and running costs of the new international authority.³⁵ It is the production royalties which will, hopefully, produce substantial profits. The U.S. proposals³⁶ envisage payment to the international authority of between 50 per cent. and $66\frac{2}{3}$ per cent. of all payments received by the State as payments on production. This would then be divided amongst listed international development organisations (specialised agencies, regional organisations etc.) in agreed percentages, to be devoted to "economic advancement of developing States." Obviously, whilst the details have still to be worked out, there is general agreement that the profits should be used substantially to aid development.

(b) The "trusteeship" concept

It is in the context of the concern to maintain the sea-bed as "the common heritage of mankind" that opposition has been voiced to the U.S. proposal for a "trusteeship" area beyond the 200-metre isobath (the proposed outer limit of national jurisdiction) and up to a point on the sea-bed to be determined by gradient and in consultation with the proposed International Sea-bed Boundary Review Commission.³⁷

The objections to this idea are, first, that having eliminated the complexity of the outer-limit of national jurisdiction by substituting a simple 200-metre isobath line, the U.S. proposal now introduces a new boundary between the "trusteeship" area and remainder of the international sea-bed area. This new boundary is not only vague but likely to conform to no standard rule and to lead to disputes between the coastal State and the Sea-bed Boundary Review Commission in each case.

The second, and main, objection is that the "trusteeship" area really gives exclusive control to the coastal State—subject only to the rules to be agreed in the Treaty and to the obligation to pay over to the International Authority between 50 per cent.

³⁵ Article 14. Appendix A suggests \$500 to \$1,500 for exploration licences and \$5,000 to \$15,000 for exploitation licences, plus an annual rental fee. The U.K. Working Paper, para. 5 (*b*) adopts the same approach.

³⁶ Appendix D. It may be thought preferable to make payment direct to the U.N. Development Programme which has an existing machinery for allocating funds for development, rather than attempting to agree on percentages for each individual organisation. For this, and other ideas on equitable sharing, see the U.N. Secretariat Study in A/8021, Annex IV.

³⁷ Article 26.

and 66 $\frac{2}{3}$ per cent. of the production royalties or payments.³⁸ The essence of the idea is therefore that the coastal State controls this area but the major financial benefit goes over to the International Authority for development purposes. This proposal for "trusteeship" has been widely criticised as being a disguised form of national jurisdiction, totally at variance with the idea of the sea-bed as the "common heritage of mankind."³⁹

However, if one envisages the "trusteeship" as a temporary phase, say for ten years, this would perhaps be more attractive since it would leave the coastal States with responsibility for control over the area most likely to be exploitable and would give the International Authority time to develop its own machinery of control and inspection.

(ii) *The area should be reserved exclusively for peaceful purposes*

The emphasis in paragraphs 5, 8 and 10 of the Declaration of Principles on "peaceful purposes" reflects a growing concern among many States that developments in technology will extend the nuclear rivalry between East and West to the sea-bed. It appears that technology now makes feasible the use of the sea-bed for listening devices, forming part of anti-submarine defences, for installing nuclear minefields, for the stationing of nuclear submarines equipped with nuclear missiles, for the erection of fuel and supply depots capable of servicing such submarines, for missile sites and for nuclear testing.⁴⁰ In 1969 both the U.S.S.R. and the U.S.A. proposed draft treaties on the military uses of the ocean floor to the 18-Nation Disarmament Conference at Geneva.⁴¹ The basic difference between the two was that the Soviet draft purported to ban the use of the sea-bed outside the twelve-mile limit "for military purposes," a concept both broad and vague; whereas the U.S. draft would merely have banned the emplacement on the sea-bed of weapons of mass destruction on fixed installations. Thus, the U.S. draft would have permitted the mobile nuclear submarine and listening devices. By the end of October 1969 the two Powers had reached agreement on a draft treaty and this

³⁸ Annex A, Article 10.

³⁹ See Proceedings of the Pacem in Maribus Convocation, Malta, June/July 1970, pp. 103-112, summarising the exposé of the U.S. proposals by Professor Louis Sohn and the criticisms offered to these proposals.

⁴⁰ Evensen, "The Military Uses of the Deep Ocean Floor and its subsoil—present and future" in *Proceedings of the Symposium on the International Regime of the Sea-Bed*, Rome, June-July 1969, at p. 535. It may be recalled that the 1963 Test Ban Treaty already bans nuclear tests under territorial waters or the high seas.

⁴¹ ENDC/240, 18 March 1969 (Soviet Draft) and for the U.S. draft dated 22 May 1969 see convenient text in 8 *International Legal Materials* (1969), 667.

became, essentially, the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, adopted by the General Assembly on 7 December 1970.⁴² This is something of a compromise,⁴³ although much closer to the U.S. conception than the earlier Soviet draft, and it may well be that the reciprocal inspection system provided for in the Treaty could, in due course, be replaced by international inspection via the international authority to be established for the sea-bed generally. Beyond this, however, it may be difficult to secure any wider interpretation of the concept of "peaceful purposes" than the 1970 Treaty now gives it.

(iii) *States shall promote international cooperation in scientific research*

Paragraph 10 of the Declaration of Principles refers to this obligation to promote scientific cooperation in research in terms of participation in international research programmes, open dissemination of results and strengthening the research capabilities of the developing countries.⁴⁴ The fact that, in the same paragraph, research activities are not to form the legal basis for any claim permits these activities either to be left completely outside the licensing system or, at least, exempted from licence fees.⁴⁵ Difficulties will arise in distinguishing pure research from exploration activities and it would be foolish to presume that pure oceanographic research will not be of interest to commercial concerns. However, if results are published openly, no special advantage should, in principle, accrue to any one State. Nevertheless, the entire principle smacks of extreme altruism and it is likely that truly international cooperation in research will best be achieved by enabling the new international authority to undertake such research on behalf of all Member States. An international authority will also be more effective in countering obstruction of research by either a

⁴² 10 *International Legal Materials* (1971).

⁴³ Article I refers to the undertaking "not to implant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer-limit of a seabed zone [12 miles] any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons."

⁴⁴ This paragraph resembles closely Article 24 of the U.S. Draft Convention. It is also reminiscent of the provision on "scientific research carried out with the intention of open publication" in Article 5 of the Continental Shelf Convention: such activity is protected against "unjustifiable interference" by the coastal State.

⁴⁵ The latter is the approach suggested in the Report of the British Branch Committee on Deep Sea Mining (*supra*, note 13), para. 21 and in the U.S. Draft, Appendix A, s. 1 (4) which envisages licences only for deep drilling, but without fee.

coastal State or a licensee State objecting to research activities in the area covered by its own exploration or exploitation licence.

(iv) *Activities shall be subject to international rules, standards and procedures designed to protect the environment*

Just as, in the Conventions which emerged from the 1958 Geneva Conference, increasing emphasis was placed on the need to protect the marine environment⁴⁶ so is emphasis now placed on the need to prevent pollution, interference with the ecological balance of the marine environment and damage to flora and fauna.⁴⁷ Indeed, in this age, when the word "pollution" has achieved unprecedented emotional overtones, it may be expected that any régime for the deep sea-bed will embody quite stringent requirements to obviate pollution hazards. The U.S. Draft is emphatic on this⁴⁸ and rightly envisages the need for detailed "legislation" which will emerge from the proposed International Sea-Bed Resource Authority rather than find a place in the basic Convention. It is the possibility of serious damage, perhaps to fisheries or coastal resorts,⁴⁹ which adds weight to the concern with questions of responsibility and liability. The device of channelling responsibility onto the Contracting State which authorises or sponsors any licensee found to be at fault⁵⁰ may be one answer. It is questionable whether this will be very effective in the case of the smaller, poorer States and it may be argued that liability could best be imposed directly on the licensee (who will be required to adduce evidence of good financial standing as a condition of the grant of a licence), supplemented by a reserve liability fund created by insurance or by allocation of funds from the revenues to be paid over to the international authority.⁵¹

Concern over the environment also raises the basic question of whether the deep-sea régime can be confined to the sea-bed or whether, given the scientific arguments for treating the marine environment as an ecological whole, the régime ought to extend to all the seas beyond national jurisdiction: this is a matter to which we shall return in the following section.

⁴⁶ See especially the High Seas Convention, Arts. 24 and 25 (pollution by oil and radioactive waste) and the Continental Shelf Convention, Art. 5 (7).

⁴⁷ Declaration of Principles, para. 11.

⁴⁸ Articles 9, 22, 23.

⁴⁹ It may prove extremely difficult to "cap" a deep sea blow-out when the drill hole is at great depths.

⁵⁰ U.S. Draft, Art. 11 (4).

⁵¹ *Ibid.*, Article 40 (K), which contemplates a "fund to provide emergency relief and assistance in the event of a disaster to the marine environment resulting from exploration or exploitation activities."

The International Institutions required for the application, supervision and enforcement of the régime

As suggested earlier, the new institutions to be created will probably be more than a mere registration authority but not an operational agency. Thus, the U.S. Draft envisages an International Sea-bed Resource Authority, with a plenary Assembly, a Council of 24 States, a Secretariat and three important Commissions: the Rules and Recommended Practices Commission, the Operations Commission, and the International Sea-bed Boundary Review Commission. In addition, there is to be a Tribunal for settlement of disputes with compulsory jurisdiction over States. The precise relationship of this new Authority with the United Nations is not determined,⁵² but it could be quite independent of the UN, or a specialised agency or even a "hybrid" (between a specialised agency and a subsidiary organ) like UNCTAD⁵³ or UNIDO.⁵⁴

The essential differences between this approach and the more ambitious Borgese draft⁵⁵ lie in the fact that the latter ruthlessly cuts through the exclusive representation of States. It brings in international corporations holding licences as "associate members"; it establishes a Maritime Commission as an executive authority and a Maritime Assembly which represents the interests of States, international mining corporations, producers and consumers, fishing organisations, and scientific bodies—each group of interests having a separate "chamber." A Maritime Planning Agency is to be composed of "economists, scientists, administrators and other experts" and a Maritime Court has compulsory jurisdiction over States and "associate members." The Borgese draft is quite clearly based upon a "supranational" approach. Above all, the régime covers "ocean space," not just the sea-bed, on the principle that ocean space is an indivisible ecological whole.⁵⁶

It is difficult to envisage States agreeing to so sweeping a rejection of their virtual monopoly of representation in international organisation or even so radical a move towards "supranational-

⁵² For discussion of the various possibilities see Sohn, "Possible Future Régimes of the Sea-Bed Resources; International Regulatory Agency" in Rome *Symposium* (*supra*, note 40) 387; also Cheever, "The role of international organisation in Ocean Development," 22 *International Organisation* (1968), 629 at pp. 646-648; Brooks, "International Organisation for Hydrospace" in *The Law of the Sea: international rules and organisation for the sea*, Proceedings of the Third Annual Conference of the Law of the Sea Institute, 24-27 June 1968, 371; and the U.N. Secretariat *Study on International Machinery*, A/8021, Annex III (originally issued as Document A/AC.138/23).

⁵³ U.N. Conference on Trade and Development.

⁵⁴ U.N. Industrial Development Organisation.

⁵⁵ *Supra*, note 20.

⁵⁶ A similar plea for this approach can be seen in Ambassador Pardo's (Malta) article "Some general considerations on the need for and the requirements of an international régime for the sea-bed and the ocean floor" in the Rome *Symposium* (*supra*, note 40), 363 at pp. 383-386.

ism." On the other hand, if a new institution is to assume an effective, regulatory power there will necessarily have to be an acceptance by States of its decisions. One can envisage decisions about the issue of licences, or their breach; decisions about competing uses where, for example, fishing or navigation interests are opposed to mineral licensing in a given area; or even decisions which bring into effect some new code of practice or rules. In short, it is inevitable that very considerable decision-making power will have to be conceded by States to a new international institution if a chaos of conflicting claims is to be avoided. Thus, whilst overt "supranationalism" may have to be avoided, in practice a good deal of supranational authority may have to be conceded. Equally, demand for treatment of "ocean space" as a whole rather than just the sea-bed has much to commend it; the most formidable obstacle to this approach is probably the sheer complexity of the problems raised. However, if a viable and effective Sea-bed Agency could be created it may be possible, in the longer term, to extend to it supervisory responsibilities over the high seas to the extent necessary to safeguard the environment and conflicting uses such as navigation and fisheries. Whatever the scope of its responsibilities or its form, if an international authority is given regulatory and supervisory powers it is likely that it will require a large, technical staff. All licensed activities will require surveillance to ensure conformity with the Convention, with the Rules and Recommended Practices likely to emerge, and with the terms of the licence itself. Doubtless, licensee States can themselves undertake surveillance of the activities of corporations enjoying a sub-licence. But it would seem unwise to rely on this as the only surveillance and, in any event, many States will not be equipped to discharge such responsibilities so that the case for a strong, international inspectorate of sea-bed activities is very compelling.

Should surveillance disclose a breach then, if "supranational" techniques of enforcement are to be rejected, a responsible operating company would have to be dealt with by the licensing or sponsoring State and a responsible State would be subject to the jurisdiction of the international tribunal to be established. If, however, one projects one's mind to the stage of the recalcitrant wrongdoer who declines to submit to judgment, then revocation of the licence may well be the answer for the private entity but not a particularly convincing answer for the recalcitrant State. Could a State be ejected from its licence area and by whom? This question is not the least of the reasons why some would argue for a system which licenses operating companies direct, and not States.

The range of choices, or solutions, and the sheer complexity of the many interrelated problems is such that agreement will be very difficult to achieve: the challenge is certainly greater than that posed in the codifications of the law of the sea in 1958. Natural optimism (an essential quality for any international lawyer) leads this writer to predict that agreement will be reached within the next few years, and this area of the law will see fundamental changes of principle and of institutions. Agreement will result not from altruism by States but from the relentless pressure on resources which will demand that a régime be formulated which will allow mankind to benefit from the wealth in and below the oceans.

CONFLICT OF LAWS 1921-1971 THE WAY AHEAD

K. LIPSTEIN

I

(1) *Legal Basis*

When the first issue of the Cambridge Law Journal appeared in 1921, the English rules of the conflict of laws were those stated and reformulated by Dicey¹ and by the editors of Westlake² and Foote.³ Their progress between 1858 and 1912 had been charted by Dicey himself in a survey published in 1912.⁴ The legal basis for the application of foreign law in England was and remained Lord Mansfield's pronouncement in *Holman v. Johnson*: "Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances . . . the law of the country where the cause of action arose shall govern."⁵ Dicey never waived in his adherence to this rule of English law,⁶ but he supplemented it with an argument drawn from the doctrine of acquired rights⁷ which bedevilled English lawyers for a long time, until in 1949 the editors of the sixth edition of Dicey took what they believed to be a bold, but substantially honest, step by restricting the concept to its proper boundaries and thus by depriving it of its capacity to serve as a general principle of the Conflict of Laws.⁸

Recent research has justified this change of approach to the basis of the English conflict of laws. The doctrine of acquired rights is of some antiquity and can be traced to the Postglossators,⁹ though it is

¹ *Conflict of Laws* (3rd ed., 1922), pp. 1-33; (1890) 6 L.Q.R. 1; (1891) 7 L.Q.R. 113.

² *Private International Law* (7th ed., 1925, by N. Bentwich).

³ *Private International Law* (5th ed., 1925, by H. Bellott).

⁴ (1912) 28 L.Q.R. 341.

⁵ (1775) 1 Cowp. 161, 171. See also *Harford v. Morris* (1776) 2 Hag.Ecc. 423, 430, 434; *Dalrymple v. Dalrymple* (1811) 2 Hag.Con. 54, 58, 59. But see Lord Mansfield in *Robinson v. Bland* (1760) 1 W.Bl. 234, 246.

⁶ (1890) 6 L.Q.R. 1, at pp. 3, 4, 6, 12, 13, 18, 20, 21; *Conflict of Laws* (3rd ed., 1922), pp. 3, 4, 6, 7, 13, 14, 20.

⁷ *Ibid.*, pp. 10, 11, 13 without any detailed discussion, but noting Savigny's critique of circuitry; cf. (1891) 7 L.Q.R. 113, at p. 114, 115; *Conflict of Laws* (3rd ed., 1922), pp. 11, 12, 14, p. 23 (General Principle No. 1), p. 25, and in particular p. 26.

⁸ Foreshadowed in the 3rd ed. (1922), p. 33. See also Cheshire, *Private International Law* (2nd ed., 1938), pp. 85-86.

⁹ Horst Müller, *Der Grundsatz der wohlverworbenen Rechte im Internationalen Privatrecht* (1935), reviewed by Gutzwiller (1936) 10 *Rabels Z.* 1056; Weiller, *Der Schutz der wohlverworbenen Rechte im Internationalen Privatrecht* (1934).

doubtful whether they wished to apply it to questions of the conflict of laws.¹⁰ It has been refuted again and again by eminent writers,¹¹ but until recently its sudden emergence in England under the auspices of Dicey has been a baffling phenomenon. The researches of Nadelmann¹² have shown that Dicey formulated his view for the first time in a review of Piggott's *Foreign Judgments*,¹³ developed it as his "General Principle No. 1" in 1891¹⁴ and then, in 1896, transported it verbatim into his "Digest of the Law of England with reference to the Conflict of Laws."¹⁵ Dicey¹⁶ acknowledged his indebtedness to Holland, whose *Elements of Jurisprudence* included the statement that the conflict of laws is in reality concerned with the recognition by English courts of rights created and defined by foreign law.¹⁷ It is difficult to see how Holland reached his conclusion for his reference to Vattel is spurious and that to Wächter reverses the latter's thoughts.¹⁸ It is possible that Holland owed it to Huber whom he cited in the second edition of his work.¹⁹

In juxtaposition with the common law rule expressed in *Holman*

¹⁰ See Gutzwiller *loc. cit.*, above, note 9.

¹¹ Wächter (1841) 24 *Archiv für die civilistische Praxis*, 230, at p. 300 and note 146; 25 (1842) 361, at p. 391; Savigny (1849) 8 *System des heutigen Römischen Rechts*, par. 361 (5), p. 132, Guthrie's transl. (2nd ed., 1880), pp. 147 *et seq.*; von Bar (1889) I *Theorie und Praxis des Internationalen Privatrechts*, p. 67, par. 23; Lorenzen (1924) 33 *Yale L.J.* 736; *Selected Articles* (1947) 1; W. W. Cook (1924) 33 *Yale L.J.* 745; *The Logical and Legal Basis of the Conflict of Laws* (1942) 1; Arminjon, *Hague Rec.* 44 (1933 II) 1.

¹² *Ius et Lex*, Festgabe für Gutzwiller (1959) 263 at pp. 276-279.

¹³ (1885) 1 *L.Q.R.* 246, 248: "the rules of . . . private international law are based on the recognition of actually acquired rights, *i.e.*, of rights which when acquired could be really enforced by the sovereign of the state where they have their origin."

¹⁴ (1891) 7 *L.Q.R.* 113.

¹⁵ p. 22; *Conflict of Laws* (3rd ed., 1922), p. 23 *et seq.*, especially p. 27; see also (1891) 7 *L.Q.R.* 113, at pp. 113 *et seq.*, 114. In (1890) 6 *L.Q.R.* 1, at pp. 3, 5, 11, 14, 17, 18, 19-21, *Conflict of Laws* (3rd ed.), p. 3 note (e), p. 5 note (f), pp. 12, 15 and note (9), 19, 20, 21, 23, he speaks of the extraterritorial operation of law or recognition of rights. This phrase is copied from Holland, *Jurisprudence* (1880), p. 288; see below, note 18. And see the critique of Pillet, *Principes de droit international privé* (1905) 514, note.

¹⁶ *Conflict of Laws*, p. VII.

¹⁷ 1st ed. (1880), p. 288 and note 1; Dicey, *Conflict of Laws* (3rd ed., 1922), pp. 3, 5, notes.

¹⁸ Nadelmann, *loc. cit.* (above, note 12), 277, 278; for the revision of these references in subsequent editions see Nadelmann, p. 277, note 90, and p. 278. The wording of Dicey's Principle I (1891) 7 *L.Q.R.* 113, *Conflict of Laws* (3rd ed., 1922) p. 23: "duly acquired" recalls a similar passage in Pillet, *Principes* (above p. 68, note 15) p. 496, no. 273; *Hague Rec.* 8 (1925 III) 489, at p. 496 who speaks of "un droit étant supposé acquis régulièrement dans un pays, c'est-à-dire conformément à la loi en vigueur dans ce pays," which is limited to a well-defined situation. See p. 497, no. 274; p. 510, note.

¹⁹ *Praelectiones ad Pandectas* II, 1, 3.15, who may have envisaged a doctrine of acquired rights in order to counter the doctrines of the statistists; see *ibid.*, II, 1, 3.2. Thus the respect for acquired rights may have served as a motive for the application of foreign law which could not apply *proprio motu*, as the statistists would have it, but not as a principle requiring the application of foreign law replacing a similar doctrine of the statistists. Cf. Dicey (1891) 7 *L.Q.R.* 113, at p. 118; *Conflict of Laws* (3rd ed., 1922), p. 33.

v. *Johnson*²⁰ the principle of the protection of acquired rights makes little sense and lays itself open to the charge of circuitry.²¹ If the rules of the conflict of laws are part of English domestic law the latter, and not an overriding principle alleged to be of universal validity (such as that of personal and real statutes), determines the application of foreign law. Moreover, the legal nature of this allegedly international principle remains uncertain. Despite certain indications mentioned above,²² Huber saw the problem in a different light, for his Third Principle proclaimed that “those who exercise sovereign authority so *act from comity* that the laws of each nation which are enforced within its own boundaries should retain their effect everywhere. . . .”²³ It may be that the stress laid on comity was meant to underline that foreign law need not be enforced as such and that no more than a general respect for foreign acquired rights inspired the unfettered right of states to apply or not to apply foreign law.²⁴ The meaning of “comity” as Huber employed it is not clear. Taken as a minimum requirement it is equal to courtesy.²⁵ Taken as a maximum requirement it must be identical with legal duty. Some help can be derived from Huber himself in *Heedensdaegse Rechtsgeleertheit*,²⁶ when he added, after formulating his three principles²⁷:

From this it is clear that the decision of such cases is a part of the law of nations and not, properly speaking, of civil law, inasmuch as it does not depend on the individual pleasure of the

²⁰ See above p. 67, note 5.

²¹ See the writers cited above p. 68, note 11, and Dicey's own admission in (1891) 7 L.Q.R. 113, at 118; *Conflict of Laws* (3rd ed., 1922), p. 33. And see in particular the formulation adopted in *Conflict of Laws* (3rd ed., 1922), p. 27: “The word ‘duly’ [acquired] . . . fixes in effect the limit of the application of General Principle I. This principle is . . . only that rights which have been, in the opinion of *English courts* (*italics mine*), properly and rightly acquired are . . . enforceable here.” This restriction appeared first in Dicey article (1891) 7 L.Q.R. 113, at pp. 118–119, but in a less explicit sense, when it was stated: “This grant of ‘due acquisition’ may arise either from A's own conduct, or from the conduct of the [foreign] sovereign either as a legislator or as judge.”

²² Above p. 68, note 19.

²³ *Praelectiones* II, 1.3, 2; *Heedensdaegse Rechtsgeleertheit* (1686) I, 3.4–6; *De jure civitatis* I, 4.1 (3rd ed.); III, 10 (1st ed., 1684).

²⁴ Meijers, *Hague Rec.* 49 (1934 III) 547, at p. 670, citing *Praelectiones* II, 1, 3.3, *Heedensdaegse Rechtsgeleertheit* I, 3.8 and 10; Kollwijn, *Geschiedenis van de Nederlandse Wetenschap van het I.P.R.* tot 1880 (1937) 145, 146, but see pp. 138, 142; Yntema, *Vom deutschen zum europäischen Recht* II (1963) 65, at p. 75 *et seq.*; (1966) 65 Mich.L.R. 1, at p. 19 *et seq.*

²⁵ Meijers *loc. cit.*, at p. 664 demonstrates the difference between the use of the terms “*de summo jure*,” “*de necessitate*,” on the one hand, and of “*de humanitate*,” “*de comitate*,” on the other hand. See also Yntema, *op. cit.*, II, p. 76, n. 30; p. 79, n. 40, n. 44. For Dicey's view, see (1890) 6 L.Q.R. 1, at pp. 9 *et seq.*, 14, *Conflict of Laws* (3rd ed., 1922), pp. 10–11.

²⁶ I, 3.7. See also *Praelectiones* II, 1.3. para. 1: “*quamquam ipsa quaestio magis ad jus gentium quam ad jus civile pertineat quatenus quid diversi populi inter se servare debeant, ad juris gentium rationes pertinere manifestum est.*” See Meijers, p. 668, note.

²⁷ *Praelectiones* II, 1.3. para. 2; *Heedensdaegse Rechtsgeleertheit* I, 3.4–6.

higher powers of each country, but on the mutual convenience of the sovereign powers and their tacit agreement with each other.²⁸

Thus according to Huber there was no duty arising by the nature of private law to apply foreign law (as the statustists assumed). Instead, customary international law (the tacit pact between states) established a duty to give full effect to a right existing according to foreign law, once a state has decided to apply foreign law in the particular circumstances. Thus understood the doctrine of acquired rights does not suffer from the flaws expressed by its critics, limited as it is to providing a motive or explanation for applying foreign law and for applying it consistently, once chosen, but it has also become meaningless as a theory.²⁹ There are indications that Dicey was fully aware of this when he qualified his principle by the addition of the word "duly."³⁰ The example given by Dicey when he proclaimed the doctrine is limited, moreover, to a situation in which all the facts of the case in issue have arisen in the same country abroad. Such an example provides the strongest motive for not applying the *lex fori* and a clear incentive for relying on the law of the country where all the facts took place. The choice of law is accompanied by a sequence in time. But it provides a weaker motive and a less clear incentive if the facts have not arisen in one single country, and if no time sequence can be observed (e.g., two separate wills made in two different countries by the same person).³¹ Nevertheless a doctrine of

²⁸ For the "tacit pact" of states, see Grotius, *De Jure Belli ac Pacis*, Prolegomena 1, 15, 16, 17, 26, 40; Yntema, *op. cit.*, II, pp. 76, 81, 83, 84, and 85 n. 65. See also Kollewijn *loc. cit.*, p. 133. But see Huber, *De jure civitatis* III, 10 nos. 1 and 2: "etsi non teneantur ex pacto vel necessitate subordinationis" (Meijers *loc. cit.*, 667, n. 2).

²⁹ See Pillet, *Principes* 135: "The respect for acquired rights is a . . . fundamental notion of Private International Law, provided that the applicable law has been determined previously and applied"; see also *Hague Rec.* 8 (1925 III) at p. 503; Lainé, *Introduction au droit international privé* II (1892) 108; Gutzwiller (1936) 10 *Rebels Z.* 1064; Kollewijn, *loc. cit.*, p. 133: ". . . it follows from the character as natural law of his *jus gentium* that inasmuch as the rule has come into existence which requires the application of foreign law, no country can withdraw from this of its own motion." Cf. Dicey (1890) 6 L.Q.R. 1, at p. 11; (1891) 7 L.Q.R. 113, at p. 118. *Conflict of Laws* (3rd ed., 1922), at pp. 12, 24, 333.

³⁰ See above p. 69, note 21. It was only the last step in the logical argument when the editors of the sixth edition (1949), pp. 11, 12, replaced the qualification that the right must have been "duly" acquired by the requirement that it must have been acquired "according to the English rules of the conflict of laws." For comments, see Falconbridge (1950) 66 L.Q.R. 104, 106; Mann (1949) 12 M.L.R. 518, 520; Cavers (1950) 63 Harv.L.R. 1278, 1280; Rheinstein (1950) 35 N.Y.U.L.R. 180, 181.

³¹ If it is assumed that a division of legislative competences exists between states, and that this division must be respected, the doctrine of acquired rights assumes the character of a legal principle based upon an overriding international duty. But such was not Dicey's point of departure, which is firmly based upon the practice of English courts as initiated by Lord Mansfield (see above, p. 67, note 5). Nevertheless traces of such a doctrine are to be found in Dicey's General Principle II (1891) 7 L.Q.R. 113, at pp. 118, 119; *Conflict of Laws* (3rd ed., 1922), pp. 27, 28; cf. Gutzwiller (1936) 10 *Rebels Z.* 1062.

acquired rights in the sense considered here may support the object of rules of Private International Law and may claim some practical merits which may have influenced Dicey when he said:

... the principle of the enforcement of vested rights does not supply such a universal test. To admit this, however, is quite consistent with maintaining that this principle does define the object in the main aimed at by rules having reference to the conflict of laws or to the extra-territorial effect of rights.³²

The court in England is invited, not to ascertain and to apply foreign law of its own motion when faced with a factual statement of claim, but to decide whether a claim brought in the light of some legal system can be sustained. It is for the parties to submit a claim based on some legal system, and it is for the court in England to determine whether the claim as framed according to foreign law is framed in accordance with that legal system which applies according to the English rules of the Conflict of Laws.³³ In the end, therefore, a choice of law must be made, and it must be made according to English Private International Law, but the initiative lies with the parties who submit claims, counterclaims or defences which rely not merely on facts but combine facts with reliance on some foreign system of laws. Technically, this insight proves useful in many respects, as will be shown later on in connection with the discussion of characterisation and *renvoi*. If this was Dicey's view, his juxtaposition of a system of English rules of the conflict of laws, unfettered by any overriding considerations or principles, and of a doctrine of respect for acquired rights is justifiable. The former provides the legal basis; the latter serves to explain a technical device.

(2) *Function of rules of the Conflict of Laws—Choice of Law Rules in Statutes; Spatially Conditioned Rules*

Students of the conflict of laws have not been content, however, with the insight that the rules of the conflict of laws are part of English law. Instead, attempts have been made again and again to determine the jurisprudential or philosophical background of these rules. Apparently the insight that they are technical rules which have no substantive content of their own and only point to some legal system as being applicable was felt to be insufficient. There is some reason for such discontent, for a crucial question has remained unsolved: In the absence of a specific rule of the conflict of laws (e.g., as regards quasi-contracts), is the court to develop a new rule by

³² (1891) 7 L.Q.R. 113, at p. 118; *Conflict of Laws* (3rd ed., 1922), p. 33.

³³ (1891) 7 L.Q.R. 113, at p. 115: "The object for which courts exist is to give redress for the infringement of rights"; see also p. 117; *Conflict of Laws* (3rd ed., 1922), pp. 26, 27.

way of analogy or otherwise, or is it to apply English domestic law as such on the ground that in the particular circumstances there is no reference to foreign law?

Graveson is one of the few English writers who has faced this problem.³⁴ For him, the underlying principle of the conflict of laws is justice, but this insight does not disclose a specific principle or philosophy which is not common to English law as a whole or which provides an answer to the question posed above. Webb,³⁵ following in Ehrenzweig's footsteps, finds some support for a trend towards the application of the *lex fori*, the validation of transactions and the exercise of free choice of law. However, these policies do not add up to a general principle, let alone philosophy. Kahn-Freund³⁶ detects a trend towards internationalism through the development of bilateral rules of the conflict of laws which are of general application and a move away from a purely jurisdictional approach. At the same time a movement in the opposite direction has been observed by a series of writers.³⁷ So-called legislatively localised laws³⁸ or particular choice of law rules,³⁹ functionally restricting rules⁴⁰ or spatially conditioned internal rules⁴¹ determine the application in space of particular rules of domestic law. Technically this is achieved by adding a choice of law provision to the particular rule of domestic law instead of formulating rules of the conflict of laws in broad categories which are then applied to claims formulated according to some system of laws, whether it be foreign law or the domestic law of the court. In English law this trend has become more distinct during the period under review.⁴²

³⁴ (1964) 78 L.Q.R. 337; *XXth Century Comparative and Conflicts Law* (1961) 307.
³⁵ (1961) 10 I.C.L.Q. 818.

³⁶ *The Growth of Internationalism in English Private International Law* (1962).

³⁷ Nussbaum, *Private International Law* (1942) 70-73; Morris (1946) 62 L.Q.R. 170; Francescakis, *Théorie du renvoi* (1958) 11-16, nos. 7-11 with references to earlier literature; *Rev.crit.d.i.p.* 1966; 1; (1967) 3 *Riv.dir.int.e.proc.priv.* 691; Graulich, *Mélanges Dabin* II (1963) 629; De Nova, *Dir.int.* 1959, 13, 500; *Mélanges Maury* I (1960) 377; *Studi Ghisleriana*, Ser. I, vol. IV: *Studi giuridici* (1967) 126-135; (1966) 54 *Calif.L.R.* 1569; von Overbeck in *De Conflictu Legum* (in honour of Kollewijn and Offerhaus) (1962) 362; Ballarino, Mosconi and Pocar in (1967) 3 *Riv.dir.int.priv.e.proc.* 707, 730, 734; Kelly (1969) 18 I.C.L.Q. 249; Danson (1963) 1 *Harv.J.of Legislation* 71; Tommasi di Vignano, *Lex fori e diritto straniero* (1964) 122-133.

³⁸ Unger (1952) M.L.R. 88; (1959) 43 *Transactions of the Grotius Society* 37; (1967) 83 L.Q.R. 427; Mann, *Hague Rec.* 111 (1964, I) 1, at pp. 69-70; Cavers, *The Choice of Law Process* (1965) 221. Francescakis calls these rules "règles d'application immédiate."

³⁹ Morris, *loc. cit.*

⁴⁰ De Nova, *loc. cit.*

⁴¹ Nussbaum, *loc. cit.*

⁴² Examples are: Wills Act 1861, ss. 1, 2; Merchant Shipping Act 1894, s. 265; Carriage of Goods by Sea Act 1924, s. 1; Legitimacy Act 1926, ss. 1, 8; Inheritance (Family Provisions) Act 1938, s. 1 as amended; Law Reform (Frustrated Contracts) Act 1943, s. 1 (1); Adoption Act 1958, s. 1 (1) (5); Legitimacy Act 1959, s. 2 (2); Marriage (Enabling) Act 1960, s. 1 (3);

It has been recognised for a long time that there are certain branches of law, primarily of a public law nature, where the problem is one of establishing the respective frontiers of legislation, but never that of applying foreign substantive law. Rules of the conflict of laws may be unilateral or bilateral, but when concerned with the application of private law they must always deal with the twofold problem of when the *lex fori* and when foreign law must be applied. It is to be noted, however, that there are certain branches of the conflict of laws which rely exclusively upon unilateral rules, for the reason that they are concerned with a process of self-limitation and not with a process of choice of law. The law of procedure is such a branch, and the law of bankruptcy is another, as are the law of taxation and administrative law.⁴³ Modern anti-trust legislation follows the same technique of self-limitation.⁴⁴ The forum never applies such foreign laws, but they can be taken into account as facts or data.⁴⁵ The ancient principle of territoriality based upon the division of legislative spheres of states fulfils its proper function here.

Spatially conditioned internal rules of the kind mentioned above are of a different kind. They are rules of private or public law to which personal or territorial limitations are attached.

The interplay between the application of ordinary rules of the conflict of laws and self-limiting choice of law rules concerning the application of domestic public law can be observed in such situations as the *Bold Case (Netherlands v. Sweden)*.⁴⁶ The application of ordinary rules of the English conflict of laws coupled with the recognition of the operation abroad of foreign self-limiting rules of public law is a frequent feature in English Private International Law.⁴⁷ The interplay between the application of ordinary rules of the conflict of laws and spatially conditioned internal rules is much rarer. Thus it was suggested by Glanville Williams,⁴⁸ following Gutteridge and Lipstein,⁴⁹ that the wording of section 1 (1) of the Law Reform

Matrimonial Causes Act 1965, ss. 14 (2) (a) (b), 24 (1) (2), 25 (1), 26 (1), 39 (1) (4), 40 (1) (a) (b); Contracts of Employment Act 1963, s. 9 (1) (2) and Sched. 1, para. 1 (3); Redundancy Payments Act 1965, ss. 17, 56 (4); Mann (1966) 82 L.Q.R. 316; see also (1964) 80 L.Q.R. 29.

⁴³ See Lipstein (1949) 26 B.Y.I.L. 553-555.

⁴⁴ Tommasi di Vignano, *Lex fori e diritto straniero* (1964), pp. 79-97.

⁴⁵ See, e.g., *Re Bettinson's Question* [1956] Ch. 67; *Regazzoni v. Sethia* [1958] A.C. 301, and *Ralli Bros. v. Cia Naviera Sota y Aznar* [1920] 2 K.B. 287, as interpreted by Mann (1937) 18 B.Y.I.L. 97; *The Halley* (1868) L.R. 2 P.C. 193, 202, and the cases cited by Lipstein in *Ius Privatum Gentium I* (1969) 411, at pp. 420-422.

⁴⁶ *I.C.J. Reports* 1958, p. 52; Lipstein (1959) 8 I.C.L.Q. 506, 512.

⁴⁷ See above n. 45.

⁴⁸ *Law Reform (Frustrated Contracts)* 1943 (1944), pp. 18-20 with reference to s. 1 (1); see Falconbridge, *Conflict of Laws* (2nd ed., 1954), pp. 428-431.

⁴⁹ [1939] 7 C.L.J. 80.

(Frustrated Contracts) Act 1943, which restricts the operation of the Act to claims arising under a contract governed by English law, lets in the old rule in *Chandler v. Webster*⁵⁰ through the operation of the ordinary rule of the conflict of laws. If in claims for unjustifiable enrichment the latter should refer to the law of the place of enrichment, English common law applies, if the enrichment is conferred in England. It is irrelevant that the contract is not governed by English law (in which case the Act of 1943 applies) but by foreign law. This case serves well as an illustration, even if the conclusion that the law of the place of enrichment invariably determines claims for unjustifiable enrichment is erroneous.⁵¹ The spatially conditioned internal rule is, in this instance, identical with the general rule of the conflict of laws. The law governing the contract applies. The Wills Act 1861 (Lord Kingsdown's Act), which is now defunct, provides a better example. While the Act applied to wills of personalty made by British subjects (and incidentally provided choice of law rules for them in these limited circumstances), the general conflicts rule, relying on the law of the domicile, applied in all other circumstances, no matter whether the testator was domiciled in England or not.

The problem is more complicated if the English rules of the conflict of laws refer to foreign law, and the foreign law applicable contains either a unilateral conflicts rule or a spatially conditioned rule of domestic law. In the former case the question is, first, whether the unilateral conflicts rule has been interpreted as a bilateral one, and, if so, secondly, whether *renvoi* applies. If it has not been interpreted as a bilateral rule, the reference to foreign law remains one to foreign domestic law. If, however, the foreign domestic rule is a spatially conditioned rule, a considerable difficulty arises.⁵² What law applies, if the spatially conditioned rule of the foreign *lex causae* fails to apply in the circumstances? *Ex hypothesi* the foreign *lex causae* does not contain a rule of domestic law which purports to apply where the spatially conditioned rule does not operate. Sometimes it may be possible to detect a rule of the conflict of laws which refers to a legal system other than that of the *lex causae*. In practice the problem does not appear to arise frequently, and since spatially conditioned rules of domestic law are often special legislation, general rules of domestic law can be relied upon. Article 992 of the Dutch Civil Code (which states that Dutch nationals must make their wills in notarial form, even if the will is made abroad) and article 170 of the French Civil Code

⁵⁰ [1904] 1 K.B. 492.

⁵¹ See Dicey, *Conflict of Laws* (6th ed., 1949), pp. 754-757; (7th ed., 1958), pp. 927-931; (8th ed., 1967), pp. 903-908.

⁵² See also Unger (1967) 83 L.Q.R. 427, 444.

(which requires French nationals marrying abroad to comply with certain formalities of French law) merely extend to situations abroad certain formal requirements of Dutch and French law concerning wills and marriages which apply peremptorily in the Netherlands and in France. Thus a reference by the English rules of the conflict of laws to Dutch or French law involving these articles as the *lex loci actus* or the *lex loci celebrationis* will mean a reference to Dutch or French law as such.⁵³ However, a spatially conditioned rule of domestic law may indicate the need to characterise the rule differently from a similar rule of domestic law which is not spatially conditioned. Thus it has been asserted that the requirement of form expressed in Article 992 of the Dutch Civil Code is to be characterised as one of substance, namely, capacity, and it remained for the Wills Act 1963⁵⁴ to exclude this practice.⁵⁵ The English Carriage of Goods by Sea Act 1924 and the Carriage of Goods by Sea Ordinances of Palestine and of Newfoundland, which provided the basis of the litigation in *The Torni*⁵⁶ and the *Vita Food Case*,⁵⁷ concern shipments out of these countries and leave it to the ordinary rules of domestic law to solve questions arising under contracts of carriage by sea into England, Palestine and Newfoundland.

None of these techniques solves the general question formulated at the beginning of this paragraph, which is whether there are any general principles according to which the balance must be struck between the application of English law, the *lex fori*, and foreign law. Upon analysis, this raises the question whether laws are limited in space or operate outside the jurisdiction which enacted them. It is clear that foreign law, by itself, cannot claim to be applied elsewhere, including England. It is incapable of exporting itself on its own, and it cannot be imported into England, except by virtue of a precept of English law embodied in a rule of English Private International Law. The problem is, therefore, to determine the range of the latter by examining the relationship between English domestic law and foreign law.

If English domestic law is a closed and self-sufficient system, it follows that English law applies even to situations containing a foreign element which form the object of litigation in England,⁵⁸

⁵³ See the decisions of the German Federal Supreme Court of 12 January 1967, *NJW* 1967, 1177; *IPRspr.* 1966-67, no. 19, p. 64, and of 19 December 1958, *BGHZ* 29, 137, *IPRspr.* 1958-59, no. 112; Kropholler, *NJW* 1968, 1561 with further references; Wengler, *Rev.crit.d.i.p.* 1954, 661, at 683, n. 2.

⁵⁴ s. 3. And see the Hague Convention of 1961 on the Form of Wills, s. 5.
⁵⁵ See Robertson, *Characterization in the Conflict of Laws* (1940), pp. 235-237; Beckett (1934) 15 *B.Y.I.L.* 46, at 73, n. 1; Falconbridge, *Conflict of Laws* (2nd ed., 1954), pp. 90-94; Lorenzen, *Selected Articles*, pp. 129-130; (1941) 50 *Yale L.J.* 743, at 755, 756; and the former practice of the German Supreme Court, *RG.*, *JW* 1913, 333.

⁵⁶ [1932] P. 78.

⁵⁷ [1939] A.C. 277.

⁵⁸ *Cf.* Pillet, *Principes*, p. 253, no. 110; p. 255, no. 112; but see p. 250.

unless a specific rule of English Private International Law restricts the operation of English law and, at the same time, introduces foreign law as an exception. On this view English law is of universal application, unless it is cut down by exceptional rules of Private International Law.⁵⁹

If English domestic law is primarily restricted to situations having a connection with England on personal or territorial grounds it follows that a broad range of rules of Private International Law must determine which foreign law is applicable. Otherwise no legal system might be applicable, or only English domestic law, thus restoring the closed and universal character of English domestic law.

No clear answer can be given, since English domestic law applies in a subsidiary capacity if foreign law, which is applicable according to the English rules of Private International Law, has not been proved. It would seem, however, that during the last century and even during the first three or four decades of the present century the former approach prevailed. Dicey believed that claims based on principles of foreign law which are unknown in English domestic law could not be enforced in England,⁶⁰ and this approach can still be met, if rarely.⁶¹ It is rough and mechanical. However, even then it was not without exceptions.⁶² Today, with the help of a more subtle process of characterisation, the second approach appears to be more favoured. Thus the introduction of adoption in England in 1926 coupled with the formulation of jurisdictional rules involving an implicit choice of law led to the development of a bilateral rule resulting in the recognition of foreign adoptions in England⁶³; the enactment of what is now section 40 (1) of the Matrimonial Causes Act 1965 enlarging the jurisdiction in divorce of English courts has since resulted in the recognition of an equivalent jurisdiction abroad,⁶⁴ appropriate rules of the conflict of laws have been developed for quasi-contracts and arbitration proceedings, and are being developed for trusts. Theoretically the approach based on the initial univer-

⁵⁹ See Unger (1957) 43 *Transactions of the Grotius Society* 87, at p. 94.

⁶⁰ (1891) 7 L.Q.R. 113, 120, General Principle II, Exception (2); see also Pillet, *Principes* 516, 36, 42.

⁶¹ See *Phrantzes v. Argenti* [1960] 2 Q.B. 19; for an earlier pronouncement, see *Sottomayor v. De Barros* (No. 2) (1879) 5 P.D. 94 (personal incapacity not recognised by English law).

⁶² Legitimation by subsequent marriage was recognised long before this institution was introduced in England; see *Re Goodman's Trusts* (1881) 17 Ch.D. 266, and foreign judicial decrees of divorce were recognised before they became possible in England; see *Warrender v. Warrender* (1835) 2 Cl. & F. 488; foreign proxy marriages are recognised although they are unknown in English law: see *Apt v. Apt* [1948] P. 83.

⁶³ *Re Wilson* [1954] Ch. 733; *Re Marshall* [1957] Ch. 507; *Re Valentine's Settlement* [1965] Ch. 831, at 844, 846, 848, overruling *Re Wilby* [1956] P. 174.

⁶⁴ *Travers v. Holley* [1953] P. 246; *Arnold v. Arnold* [1957] P. 237; *Manning v. Manning* [1958] P. 112; *Robinson-Scott v. Robinson-Scott* [1958] P. 71, limited by the considerations in *Levett v. Levett* [1957] P. 156.

salinity of English domestic law is attractive, and even the present trend towards bilateral rules of jurisdiction and choice of law can be accommodated within it. In no circumstances can it be said that the foreign law so referred to is incorporated into English law.⁶⁵

(3) *Characterisation*

Although the problem of characterisation had been introduced into Anglo-American literature in 1920,⁶⁶ English writers did not take note of it until the thirties,⁶⁷ and the courts applied the *lex fori* to an unconscious process of characterisation. This technique has been firmly approved where the interpretation of connecting factors forming part of rules of Private International Law of the forum is concerned.⁶⁸ The same process may also seem natural in any legal system when it comes to the interpretation of the operative facts,⁶⁹ and it is seemingly imperative in those legal systems where the courts are believed to be called upon to apply foreign law of their own motion to a set of facts pleaded by the parties.⁷⁰ In reality no suit involving a foreign element is introduced in which the plaintiff (and subsequently the defendant) has not considered his rights (or his defences) according to some legal system; in English law, moreover, a party must plead not only the facts but also the law, if foreign, on which he intends to rely. In other words, the plaintiff introduces his claim in the light of some foreign law according to which he alleges to have a right against the defendant.⁷¹ The same applies to a defendant who may wish to plead that some other law, whether English or foreign, applies. The court, relying on its set of rules of the conflict of laws, must ascertain which rule of English Private International Law covers

⁶⁵ The doctrine of “*rinvio ricettizio*” in its various forms is not part of English law, and foreign law, when applied by English courts, remains the law of a foreign country. The principles on proof of foreign law bear out this contention.

⁶⁶ Lorenzen (1920) 20 Col.L.R. 20.

⁶⁷ Beckett (1934) 15 B.Y.I.L. 46; Unger (1937) 19 *Bell Yard* 3; Robertson, *Characterization in the Conflict of Laws* (1940); (1939) 52 Harv.L.R. 747; see also Falconbridge (1937) 53 L.Q.R. 235, 537; revised (1952) 30 Can. Bar Rev. 103; *Conflict of Laws* (2nd ed., 1954), pp. 50 *et seq.*

⁶⁸ *Re Annesley* [1926] Ch. 692; for a strict differentiation between the interpretation of connecting factors and characterisation of operative facts, see Makarov (below, n. 70), p. 151, n. 8.

⁶⁹ For the use of this term, see Rabel, *Conflict of Laws* I (1945), p. 42; (2nd ed., 1958), p. 47; Falconbridge, *Conflict of Laws* (2nd ed., 1954), p. 44; and see Makarov (below, n. 70) at p. 150, n. 7.

⁷⁰ See also Makarov, *Vom deutschen zum europäischen Recht* II (1963), 149, at p. 154; Wengler, *Rev.crit.d.i.p.* 1954, 66 at pp. 670, 673, 682, rejecting for such countries the approach advocated here—see *loc. cit.*, pp. 666–667, 671, 674; see also Wengler, *Festschrift für Martin Wolff* (1952) 337, at pp. 340, 356.

⁷¹ As was suggested above, Dicey's theory of acquired rights may perhaps have been derived from such an analysis of the process in an English court leading to a choice of law. The court in England does not apply foreign law as such. It determines whether a particular claim based on foreign law is supported by the English choice of law rules.

the claim.⁷² Difficulties arise from the fact that the claim is, *ex hypothesi*, expressed in substance and in form in terms of foreign law. The operative facts of English rules of Private International Law are formulated sometimes in terms of English domestic law,⁷³ but more frequently in terms peculiar to English Private International Law,⁷⁴ yet the court must apply its own rules of Private International Law to claims presented in terms of foreign domestic law, if it is to determine whether the law pleaded by the party applies.⁷⁵ For this purpose each must be interpreted in terms of the other.⁷⁶ This process of subsuming claims formulated in accordance with one legal system under one of several rules of the conflict of laws of the forum by way of interpreting each in terms of the other is the essence of characterisation. The process of interpreting rules involving at least two, and possibly more, legal systems must necessarily rely on some legal notions, and over the years reliance on those of the *lex fori*, the *lex causae* and of comparative jurisprudence has been canvassed in turn. The present analysis must discard the approach from the *lex fori*, which assumes that facts alone must be characterised and not facts presented in the light of some legal system, or at least in the light of a plea based on English domestic law.⁷⁷ Where English

⁷² Cf. Robertson, p. 127; Falconbridge, *Conflict of Laws* (1947), p. 101; (2nd ed., 1954), p. 59, believes that the court provisionally consults foreign law before finally characterising the question for the purpose of selecting the proper law. See the valid critique in Dicey, *Conflict of Laws* (8th ed., 1967), p. 27. The present account avoids this pitfall by analysing the concrete situation.

⁷³ e.g., contract, tort, succession, capacity to marry, formality.

⁷⁴ e.g., status, rights in movables or immovables, evidence, procedure, property relations between spouses.

⁷⁵ It is assumed that the application is opposed by the other party, who alleges that another legal system is applicable.

⁷⁶ In order not to complicate and to confuse this analysis no mention is made at each stage that the same process applies, if the defendant relies for his defence on English law. Here again the court must apply its own rules of Private International Law (which are not always expressed in terms of English domestic law) in order to determine whether English law applies: see *British Linen Co. v. Drummond* (1830) 10 B. & C. 903; *Huber v. Steiner* (1835) 2 Bing.N.C. 202, 210, 213; *Don v. Lippman* (1837) 5 Cl. & F. 1, 13, 16; *Leroux v. Brown* (1852) 12 C.B. 801, 823; *Bristow v. Sequeville* (1850) 5 Ex. 275; *Re Martin, Loustalan v. Loustalan* [1900] P. 211, 230, 233, 240; *S. A. de Prayon v. Koppel* (1933) 77 S.J. 80; *Re Cutcliffe's Will Trust* [1940] Ch. 565; *Re Middleton's Settlement* [1947] Ch. 329, 583 (C.A.); [1949] A.C. 418; *Re Priest* [1944] Ch. 58; *Adams v. National Bank of Greece* [1961] A.C. 255, 287; see also *Dreyfus (C. and H.) Foundation Inc. v. I.R.C.* [1956] A.C. 39; *Rae (Inspector of Taxes) v. Lazard Investment Co. Ltd.* [1963] 1 W.L.R. 555; *Baron Inchyra v. Jennings (Inspector of Taxes)* [1966] Ch. 37.

⁷⁷ This seems to be the view expressed by Inglis (1958) 74 L.Q.R. 493, at pp. 509, 513, who argues from the decisions in *Re Cohn* [1945] Ch. 5 and *Re Maldonado* [1954] P. 223 that where conflicting claims are made which rely respectively on English and foreign law, only the claim based on English law is characterised. If English law is then found to be inapplicable according to the relevant English rule of Private International Law, the claim based on foreign law is not characterised and is admitted without further consideration. The cases cited do not bear out this contention. Tommasi di Vignano, *Lex fori e diritto straniero* (1964) 217, holds that a relationship alleged to be governed by foreign law remains a factual relationship.

courts have followed this technique the result has been unfortunate.⁷⁸ However, the present analysis also does not embrace the approach from the alleged *lex causae*, which has come in for acute criticism by the present writer,⁷⁹ but it takes the *lex causae* into consideration. According to the view set out here, abstract rules of law alone are not characterised. The courts analyse the nature of a claim (or defence) expressed according to foreign (or English) law in the light of the function (not the technical connotation) of that rule within the particular legal system. They relate the claim so analysed to that among their conflicts rules which, upon a broad interpretation (not restricted to notions of English domestic law), is capable of covering the claim in question. This interpretation of disparate notions in terms of each other is the process of characterisation. The result is an indication of the law applicable which may or may not be that which has been pleaded by the parties.

Technically the problem of characterisation involves one of three situations: either the claim or defence is identical in form and in substance with similar claims or defences in English domestic law⁸⁰ or it is unknown in substance and in form in English law⁸¹ or it corresponds in form to a similar claim under English law but the formal similarity conceals a material difference.⁸²

The process of characterisation set out here was in effect adopted by Uthwatt J. (as he then was) in *Re Cohn*⁸³ and by Scarman J. in *Re Fuld*,⁸⁴ though it has not been formulated in the terms submitted here.⁸⁵

⁷⁸ *Ogden v. Ogden* [1907] P. 46 (C.A.), and the comments in Dicey and Morris, pp. 237-239; Westlake, *P.I.L.* (2nd ed., 1925), p. 61; *Phrantzes v. Argenti* [1960] 2 Q.B. 19.

⁷⁹ Note to *Re Maldonado* [1954] P. 223; [1954] C.L.J. 123.

⁸⁰ See the cases cited above n. 76, and see *Re Wilks* [1935] Ch. 645; *Re Kehr* [1951] 2 T.L.R. 788; [1951] 2 All E.R. 812; *Re Barnett's Trusts* [1902] 1 Ch. 842; *Mahadervan v. Mahadervan* [1964] P. 233, 241-242.

⁸¹ *Baithyany v. Walford* (1887) 36 Ch.D. 269, 278; *De Nicols v. Curlier* [1900] A.C. 21; *Re Bonacina* [1912] 2 Ch. 394, 396 (C.A.) *Phrantzes v. Argenti* [1960] 2 Q.B. 19, 36 and the comments in (1960) 9 I.C.L.Q. 508; (1960) 23 M.L.R. 446.

⁸² *Ogden v. Ogden* [1908] P. 46, and see also *Bliersbach v. McEwen* 1959 S.C. 43; *Lodge v. Lodge* (1963) 107 S.J. 437, and see the comments by Anton (1959) 3 Jur.Rev.(N.S.) 253, 277; Carter in (1960) 36 B.Y.I.L. 417; *Re Maldonado* [1954] P. 223, 231, 244 *et seq.*, but see Lipstein [1954] C.L.J. 22. See also Garde Castillo, *La Institución Desconocida en el d.i.p.* (1947), pp. 46-47.

⁸³ [1945] Ch. 5. According to Master Jacob in *Smit, International Cooperation in Litigation (Europe)* (1965), p. 103 n. 205, the parties in this case agreed not to plead foreign law and to leave the question of foreign law to the court.

⁸⁴ [1966] 2 W.L.R. 717, at pp. 735, 736-738.

⁸⁵ It is useful to note the approach adopted in recent times by the German Federal Supreme Court in a decision of 12 January 1967, *NJW* 1967, 1171, *IPRspr.* 1966-67, no. 19, p. 64. The court said: "The subsumption of these rules [i.e., Art. 992 of the Dutch Civil Code] must be made in accordance with German law. In this connection the following principles of interpretation must be observed: the rules of foreign law must be examined with a view to their meaning and purpose, they must be analysed from the standpoint of foreign law and

It is now clear that a party must plead foreign law for two purposes: first, in order to enable the court to embark upon a selection of law, and, secondly, in order to enable the court to apply that law, once it has been found to be applicable. The court, in turn, must consider the law pleaded by the parties at two stages; first, in order to apply its own rules of Private International Law, which may or may not result in the selection of the foreign law pleaded by the party and, secondly, in order to apply the particular foreign law which has been selected by its own rules of Private International Law.⁸⁶ Of course foreign law is pleaded only once and proved only once, even if it must be considered at two stages of the process of judicial reasoning. The first stage alone involves the process of interpretation known as characterisation or qualification. The second stage, which is exclusively concerned with the application of foreign law, is no longer concerned with the fact that foreign domestic law or foreign Private International Law would adopt a different process of characterisation, if the case had arisen abroad.⁸⁷ The reason is, as stated above, that a choice of law in English Private International Law is initiated by pleadings which contain not only the facts but include the individual rule or set of rules of foreign law on which the party relies and which are alleged to be applicable. Thus English Private International Law is at no stage concerned with foreign law in the abstract or with the categories of foreign law in general, while it is concerned with the functional analysis of a particular rule within its own setting. Consequently no additional reliance on the characterisation of foreign law as practised abroad by the courts of the country of the alleged *lex causae* for the purpose of applying their own rules of Private International Law is required. There is no need to reduce the foreign law applicable to concrete rules⁸⁸ and to individualise the rules of foreign

must be compared with the institutions of the German legal order. On the basis of this knowledge they must be subsumed by the German rules of Private International Law, the characteristics of which are shaped by the notions and delimitations of German law." See also B.G.H.Z. 29, 137, *IPRspr.* 1958-59, no. 112, p. 389; and see Castel (1961) 39 Can. Bar Rev. 93, 192, citing *Livesly v. Horst* [1924] S.C.R. 605; [1925] 1 D.L.R. 159.

⁸⁶ Compare *Huber v. Steiner* (1835) 2 Bing.N.C. 203 at pp. 212, 213; Robertson, *op. cit.* p. 248; Falconbridge, *Conflict of Laws* (1947), pp. 101, 106.

⁸⁷ Only if the English court, in deference to the English doctrine of *renvoi*, sits as a foreign court, it must have regard to the characterisation, if different, by the foreign *lex causae*. The present conclusions constitute, therefore, a rejection of secondary characterisation. For this problem, see Robertson, *op. cit.*, pp. 118-134, 255-279; Cheshire, *Private International Law* (3rd ed., 1947), pp. 71-85; Falconbridge, *Conflict of Laws* (1st ed., 1947), pp. 98 *et seq.*, 107, 161 *et seq.*; 184 *et seq.*, but see (2nd ed., 1954), p. 68, note g; (1939) 17 Can. Bar Rev. 369; (1941) 19 Can. Bar Rev. 311, at 334.

⁸⁸ Falconbridge, *Conflict of Laws* (2nd ed., 1954), pp. 59, 60, 134, is inclined to think in terms of abstract rules.

law a second time. They are individualised in the pleadings once and for all.⁸⁹

Transposition, Substitution and Adaptation of laws are unknown as such in the English conflict of laws, but in practice these phenomena, first observed by continental writers,⁹⁰ can be found in English Private International Law as well. The line of demarcation between them is not always clear.⁹¹ Certain it is that none of them concerns a choice of law; in all of them the choice of law has taken place, but owing to the fact that different aspects of a situation may be governed by different legal systems a reconciliation between various institutions of the several legal systems applicable in the circumstances may be called for.

Transposition was the technique employed in *Studd v. Cook*⁹² and in *Re Piercy*⁹³ when the events enjoined the creation at the *situs* of interests as nearly as possible identical with those created by a will governed by another legal system and expressed in terms of different institutions.

Substitution may be illustrated by a reference to section 16 (1) and (2) of the Adoption Act 1958, which provides:

(1) Where at any time after the making of an adoption order, the adopter . . . dies intestate . . . that property shall devolve . . . as if the adopted child were the child of the adopter born in lawful wedlock. . . .

(2) In any disposition of . . . property made . . . after the date of an adoption order . . . any reference . . . to the child or children of the adopter shall . . . be construed as . . . a reference to the adopted person.

As enacted, section 16 (1) and (2) envisages English adoptions. The question is whether it can include foreign adoptions. The practice of the courts in England shows that such adoptions, made by the authorities which are competent according to English Private Inter-

⁸⁹ The popular analysis which detects a process in three stages is thus accepted subject to the explanations given above that: (i) analysis of the function of the rule of foreign (or English) law within its own setting and (ii) interpretation of the operative facts of the rules of Private International Law of the forum alleged to be relevant must be carried out simultaneously followed by (iii) application of the rule of foreign law found to be applicable. Cf. Dicey, *Conflict of Laws* (8th ed., 1967), p. 30; Falconbridge, *Conflict of Laws* (2nd ed., 1954), pp. 50 *et seq.*, 133-136; Inglis (1958) 74 L.Q.R. 493, 503.

⁹⁰ These categories were first discussed by Lewald, *Hague Rec.* 69 (1939, III) 1, at p. 129.

⁹¹ According to Neuhaus, *Grundbegriffe des Internationalen Privatrechts* (1962) 251, n. 604, the category described as transposition merges into the other two. There is some substance in this contention, at least as far as any overlap between transposition and substitution is concerned.

⁹² (1883) 8 App.Cas. 577, at pp. 591, 600, 604.

⁹³ [1895] 1 Ch. 83, 89.

national Law and which place adopted children in a position substantially equivalent to natural children, conferring comparable rights upon the parties as exist under English law, will be treated as adoptions for the purpose of this section.⁹⁴

It will have been noticed that problems of transposition and substitution arise only after a choice of law has been made in accordance with the Private International Law of the *forum* which has led to the application of different systems of law to different aspects of the case. In the case of *transposition* the disparate institutions representing the different aspects of the case are adjusted to each other. In the case of *substitution* the question is whether the institutions representing the different aspects of the case correspond to each other to such an extent as to be interchangeable.⁹⁵ In both cases the problem is one of comparing institutions of domestic law in order to integrate the different aspects of the case after the operation of the conflicts rules of the forum has led to the application of different legal systems to these various aspects.

Adaptation raises entirely different questions. If different aspects of a case are governed by different legal systems, the operation of different laws may create hardship and material injustice. The following example may serve as an illustration.⁹⁶ Spouses were domiciled in a common law State of the United States during their working life. Upon their retirement they acquire a domicile in California. The husband dies. According to the law of California matrimonial property relations are governed by the law of the domicile of the spouses at the time of the marriage; succession to movables is governed by the law of the last domicile. According to the law of the common law State, the matrimonial régime was separation of goods, but the surviving spouse is accorded a share in her spouse's estate on the latter's death. According to the law of California spouses live according to a régime of community of goods, but a spouse is not entitled to a share in the other's estate by virtue of the law of succession. The result is that both the law of the common law State and the law of California grant a spouse some share in the assets of the other, but by applying the common law rule to matrimonial property relations (because it was the law of their domicile at the time) and the law of California to the succession (because it is the law of the last domicile of the deceased) the surviving spouse goes away with empty hands. In the converse case she collects twice

⁹⁴ *Re Marshall* [1957] Ch. 507 (C.A.), overruling *Re Wilby* [1956] P. 174.

⁹⁵ See, e.g., *Tursi v. Tursi* [1958] P. 54: effect of a foreign separation order upon a state of desertion according to English law.

⁹⁶ It is superficially reminiscent of situations such as that decided in the arrêt *Bartholo, Clunet* 1891, 1171; Robertson, *Characterization in the Conflict of Laws* (1940), p. 158 *et seq.*

over.⁹⁷ The result is not due to a faulty technique of the conflict of laws, but to the fact that each legal system is a coherent whole. Choice of law, which leads to the application of different laws to different aspects of the case, may cause a disequilibrium of solutions, but it is for the domestic law of succession to redress the balance by a process of adaptation.⁹⁸

(4) *Renvoi*

Renvoi was well known as a problem fifty years ago⁹⁹ and it was solved in practice on the strength of Westlake's theory of desistment.¹ Subsequent decisions have relied on other grounds,² and it has become clear that *renvoi* applies only in certain specific situations.³ The problem has not been put to rest, however, as to what are its limits in practice, if it is a desirable institution at all.

The present discussion starts from the premise that an English court does not apply foreign law, unless it is pleaded and proved in the individual case. If the parties fail to prove foreign law, the court must apply English law, and if the parties discharge the burden of proof the court cannot scrutinise the content of foreign law except

⁹⁷ *Baudoin v. Trudel* [1937] 1 D.L.R. 216; [1937] O.R. 1.

⁹⁸ See the California Probate Code, s. 201.5 (California Statutes 1957, c. 490). And see the cases cited by Lewald, pp. 140-148.

⁹⁹ *Re Johnson* [1903] 1 Ch. 821; *Re Bowes* (1906) 22 T.L.R. 711.

¹ *Private International Law* (4th ed., 1905), pp. 33, 40, (5th ed., 1912), pp. 32, 34; Falconbridge, *op. cit.*, pp. 212-215, esp. p. 214, note (y).

² *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377 (foreign court theory); *Re Askew* [1930] 2 Ch. 259 (acquired rights).

³ Status: *Re Askew* [1930] 2 Ch. 259; succession to movables: *Re Annesley* [1926] Ch. 692, and to immovables: *Re Ross* [1930] 1 Ch. 377; *Re Duke of Wellington* [1947] Ch. 506, [1948] Ch. 118 (C.A.); capacity to marry: *R. v. Brentwood Superintendent Registrar of Marriages, ex p. Arias* [1968] 2 Q.B. 956; formalities of marriage: *Taczanowska v. Taczanowski* [1957] P. 301, 305. *Renvoi* does not apply to contracts: *Re United Railways of Havana v. Regla Warehouses Ltd.* [1960] Ch. 52, at pp. 96-97, 115 (C.A.), but see [1958] Ch. 724, 760 (Wynn-Parry J.); Hall (1959) 109 L.J. 645; see also *Rosencrantz v. Union Contractors Ltd.* (1960) 23 D.L.R. (2d) 473; Castel (1961) 39 Can. Bar Rev. 93; (1961) 21 Rev. du Barreau de Quebec 181, 199; Sherwood (1956) 5 A.J.Comp.L. 120-125. The question remains open for discussion whether it should be admitted in the law of contract, if the parties have not exercised an express or implied choice. See the survey by Graue, *Aussenwirtschaftsdienst des Betriebsberaters* 1968, 121; Gamillscheg (1962) 27 *Rabels Z.* 591; Maier, 1962 *NJW* 323, 325; Kreuzer, *Das Internationale Privatrecht des Warenkaufs* (1964) 284; Hartwig, *Renvoi im internationalen Privatrecht* (1967) 152, 156; Vischer, *Internationales Vertragsrecht* (1962) 111; Batifol, *Conflits de Lois en matière de contrats* (1938) no. 53; *Traité de d.i.p.* (4th ed., 1967), no. 311, p. 358 and note 52 bis; Kegel in *Soergel's Kommentar* (10th ed., 1970), note 34 to article 27; Kelly (1969) 18 I.C.L.Q. 249, at p. 257, n. 39. And see the following cases: *Mason v. Rose* 176 F. (2d) 486 (2 Cir. 1949); *Siegelman v. Cunard* 221 F. (2d) 189 (1 Cir. 1955); *University of Chicago v. Dater*, 227 Mich. 658, 279 N.W. 175 (1936); *ca: Lann v. United Steel Works Corp.*, 166 Misc. 465, 1 N.Y.S. (2d) 951, 957; *C. A. Frankfurt*, 13 November 1956, *IPRspr.* 1956-57 No. 24, affirmed by the German Supreme Court, 14 February 1958, *NJW* 1958, 750, *AWD* 1958, 57, *IPRspr.* 1958-59 no. 39, p. 155 and of 9 June 1960, *NJW* 1960, 1720, *AWD* 1960, 183, *IPRspr.* 1960-61 no. 23, p. 94; but see Swiss Federal Tribunal, 21 October 1955, BGF 81, II 391.

in two circumstances, one of which is important here.⁴ If the parties lead conflicting evidence the court must determine the disputed question of foreign law.⁵ The evidence may be conflicting because one party proves a rule of foreign domestic law while the other proves foreign domestic law coupled with foreign Private International Law which leads to a reference back to the *lex fori* or on to a third legal system. In this situation, the English court is compelled to determine, as a question of English Private International Law, what is, in its view, the correct solution according to the foreign *lex causae*. Now it would appear that in principle the parties must prove how the particular dispute involving a foreign element, which is before the English court, would be decided by the foreign law which is the *lex causae*. The parties are not called upon to prove how a similar case would be decided by the foreign *lex causae*, if no foreign element were involved. To hold otherwise would mean to allow proof of foreign law as applied to a hypothetical case, while what is required is proof of the hypothetical judgment of the foreign court in the actual case before an English court. In short, it would appear that an English court must accept that evidence which purports to show how a dispute involving identical facts, and therefore a foreign element, would be determined by the foreign law which is applicable according to English Private International Law.⁶ It follows that an English court is bound to accept foreign rules of Private International Law as part of the evidence of foreign law. English law is, of course, free to reject *renvoi* explicitly, and the question discussed above in what circumstances *renvoi* is admitted is only the reverse of the question when it is excluded. It is a question of practical convenience and not of legal theory.

It remains to consider the newly discovered, so-called "concealed," *renvoi*.⁷ This is said to arise when the conflicts rule of the *forum* refers to foreign law, and the foreign law (mainly common law) regards the question as one of jurisdiction, treats jurisdiction and

⁴ The other concerns the rejection of foreign law on the ground of public policy.

⁵ *Lazard Bros. v. Midland Bank* [1933] A.C. 289, at 298; *A. S. Talinna Laevauhisus v. Esthonian S.S. Line* (1946) 80 Lloyd's List Law Report 99, at p. 107 *et seq.*

⁶ The desire to reach a decision identical with that which would be reached in the country of the *lex causae* induced Dicey, *Conflict of Laws* (3rd ed., 1922), p. 775, to relate *renvoi* to jurisdiction.

⁷ See Hanisch, *NJW* 1966, 2085 with lit. and cases p. 2086, n. 15; see especially Neuhaus, *Grundbegriffe des I.P.R.* (1962) 190-194; JZ 1954, 704; Gündisch, *Fam. R.Z.* 1961, 352; Jayme, *Dir. Int.* 22 (1968), pp. 84, 88, notes 33, 34, with lit.; Ehrenzweig, *Treatise on the Conflict of Laws* (1962) 404. For a case of concealed reference on (transmission) see the decision of the Court of Mainz of 21 October 1966, StAZ 1967, 24; *IPRspr.* 1966-67, no. 159, p. 502, reported by Jayme, *loc. cit.*, and in (1969) 21 Florida L.R. 290; Soergel-Kegel, *Kommentar zum BGB*, vol. VII (10th ed., 1970), note 14 to art. 27. Von Mehren in *XXth Century Comparative and Conflicts Law* (1961), pp. 380, 382, uses the term in a different sense.

choice of law as co-extensive and attributes jurisdiction to the *forum*. In these circumstances it is said that the refusal to assume jurisdiction and the attribution of jurisdiction to the courts of the *forum* equals a reference back to the *lex fori* as well.

In the case when a civil law country, *e.g.*, Germany, is the *forum*, instances include proceedings in Germany between American or English spouses domiciled there concerning the custody of a child of the marriage. A reference to the personal law of the spouses (to the law of a state of the U.S.A. or England) is said to be met by a jurisdictional attribution of competence to the courts in Germany, and thus to imply a reference to German law. Similar situations, it is argued, may arise in connection with divorces and ancillary claims arising therefrom, as well as in cases of adoptions governed by English law. It is questionable whether in such circumstances a reference to the English law of divorce or adoption can be more than a reference to the English domestic law of divorce or adoption, and not the law of jurisdiction. It is true that English courts, if seized, would have had to decline jurisdiction, and thus also to decline the application of English law. But the refusal to assume jurisdiction is not equal to a reference back or on to another jurisdiction, and, *ex hypothesi*, the English court has never been seized at all. In other words, the reference by German law to the English law of divorce or adoption is a reference to the substantive law of England, and the refusal of English courts to assume jurisdiction is not a reference back or on in the field of jurisdiction, and still less in the field of substantive law. It is equally true that English courts will recognise a German decree of divorce or an adoption order, if made by a court having jurisdiction, irrespective of what law was applied.⁸ Thus in the first case the jurisdictional problem has not arisen and cannot arise; if it did, it must be remembered that the English rule of jurisdiction is strictly unilateral⁹ and does not purport to shift jurisdiction and thus, by implication, the law applicable. In the second case a choice of law problem does not arise. Thus *renvoi*, even of the concealed kind, does not come into play. It is difficult to envisage a situation in which this problem could be raised in an English court, except in the circumstances of section 1 of the Adoption Act 1958 or of *Armitage v. Att.-Gen.*¹⁰ The former would equal a choice of the foreign law of the domicile. If according to the latter (say Ontario law), the courts of the parties' residence (*e.g.* England) have juris-

⁸ The situation is not unlike that in *Armitage v. Att.-Gen.* [1906] P. 135, which is not regarded as one involving *renvoi*. See Dicey and Morris, *Conflict of Laws*, pp. 61-62.

⁹ See above p. 73.

¹⁰ [1906] P. 135. See also *Abate v. Abate* [1961] P. 29; *Mather v. Mahoney* [1968] 1 W.L.R. 1773; [1968] 2 All E.R. 223.

diction, the reference back to English law is said to be implied. In reality, the English court cannot assume jurisdiction on a reference by foreign law, and the implied reference back to English law does not operate. If English courts recognise a divorce granted by the courts in South Dakota, because it is recognised by courts of the domicile, New York, a question of recognising a foreign decree, but not a reference on by foreign (New York) law is involved.

(5) *Public Policy*

It has always been admitted that any right, power, capacity, disability or legal relationship arising under foreign law need not be enforced, or even recognised, if it conflicts with the fundamental public policy of English law.¹¹ Enforcement is refused, in the first place, in respect of those rules of foreign law to which English rules of the conflict of laws do not extend, because they are penal or revenue laws, but not merely because they are confiscatory.¹² It is refused, in the second place, if it conflicts with English political or social institutions. In recent years these principles have been attacked at their foundations by a series of cases which were principally concerned with the recognition of foreign decrees of nullity and divorce,¹³ but in one instance with a foreign diminution of status imposed by an order of a foreign court.¹⁴ According to the judgments in these cases, English courts have a residual discretion, at least in the particular circumstances, to refuse to recognise the operation of the applicable foreign law or of the competent foreign jurisdiction, if the recognition would be improper or unjust or unconscionable in the circumstances of the particular case.¹⁵ If these judicial pronouncements were to indicate that any such principle had found its way into English Private International Law, the strictures of Morris that "the whole of the conflict of laws, or even that part which is concerned with status [is reduced] to the

¹¹ Dicey, Rule 2.

¹² *Luther v. Sagor* [1921] 3 K.B. 532; *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718; *Re Banque des Marchands de Moscou (Koupetchesky), Royal Exchange Assurance v. The Liquidator* [1952] 1 All E.R. 1269, 1271; *Re Banque des Marchands de Moscou (Koupetchesky) (No. 2)* [1954] 1 W.L.R. 1108, 1113; *Re Russian Bank for Foreign Trade* [1933] Ch. 745, 766. They will be disregarded if the confiscatory law is penal: *Novello v. Hinrichsen* [1951] Ch. 595, 1026 (C.A.). If the foreign confiscatory legislation purports to operate in respect of assets in England, the rule that English law as the *lex situs* must be applied, and not the confiscatory character of the foreign law, leads to the disregard of the foreign law; see *Bank voor Handel v. Slatford* [1953] Q.B. 248, 261; *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140.

¹³ *Gray v. Formosa* [1963] P. 259; *Lepre v. Lepre* [1965] P. 52.

¹⁴ *Re Langley's Settlement Trust* [1962] Ch. 541.

¹⁵ *Re Langley's Settlement Trust* [1962] Ch. 541, 555, 557-558 (C.A.); *Russ v. Russ* [1963] P. 87, 100; [1964] P. 315, 327-328; 334, 335 (C.A.); *Cheni v. Cheni* [1965] P. 85, 98; *Gray v. Formosa* [1963] P. 259, 269, 270, 271 (C.A.); *Lepre v. Lepre* [1965] P. 52, 63; *Qureshi v. Qureshi* [1971] 1 All E.R. 325, 343 (55), 346 (63), [1971] 2 W.L.R. 518, 536 (4), 540.

level of judicial discretion,"¹⁶ must apply, and English Private International Law would have returned to the starting point of all Private International Law in the late twelfth century.¹⁷ However, at present these pronouncements have not operated to the exclusion of the application of the law normally applicable by an English court itself, and the basis of the alleged power is weak, derived as it is from a misinterpretation of earlier cases.

In *Re Langley's Settlement Trust*¹⁸ Lord Evershed M.R. relied on a passage in *Baindail v. Baindail*¹⁹ where Lord Greene M.R. said in respect of the recognition of a foreign polygamous marriage:

The practical question in this case appears to be: Will the courts of this country, in deciding upon the validity of this English marriage, give effect to the status possessed by the respondent? That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The learned judge set out . . . some of the consequences which would flow from disregarding the Hindu marriage for present purposes.²⁰

Thus Lord Greene rejected, on grounds of common sense and reasonable policy, the sweeping contention that all polygamous marriages must be disregarded for all purposes on grounds of public policy. He distinguished between status as such and some of its incidents (such as the right to matrimonial remedies). Public policy, as a means of rejecting the application of foreign law which is normally applicable, must be used cautiously. The judicial discretion must temper an all-out rejection of foreign law.²¹ In *Re Langley's Settlement Trust*,²² this observation of Lord Greene was torn out of its context²³ and was used to justify exactly the opposite process, namely, to disregard the foreign law which is normally applicable, despite the fact that the foreign status of incompetence was not penal or governed by English law as being procedural.

What was meant to restrict the uncritical use of public policy by

¹⁶ Dicey and Morris, pp. 76-77; Grodecki (1962) 11 I.C.L.Q. 578, 582; Nygh (1964) 13 I.C.L.Q. 39, 51; Cheshire, 151-152.

¹⁷ Aldricus (1170-1200): quaeritur si homines diversarum provinciarum quae diversas habent consuetudines, sub uno eodemque iudice litigant, utram earum iudex qui iudicandum suscepit sequi debeat. Respondeo eam quae potior et melior videtur. Debet enim iudicare secundum quod melius ei visum fuerit secundum Aldricum. See Gutzwiller, *Hague Rec.* 29 (1929, IV) 291, 301 n. 1; Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus*, II (1916) 67; Meijers, *Bijdrage*, p. 87; Niederer in *Festschrift für Hans Fritzsche* (1952) 115; Rev. crit.d.i.p. 49 (1960) 137, 141.

¹⁸ [1961] Ch. 541, 554.

¹⁹ [1946] P. 122 (C.A.).

²⁰ At p. 129.

²¹ See also Scarman J. in *Russ v. Russ* [1963] P. 87, 99-100, [1962] 2 W.L.R. 708, at 714-715; *In the Estate of Fuld* [1966] 2 W.L.R. 717, 737.

²² [1962] Ch. 541, 554.

²³ Despite Lord Greene's warning: [1946] P. 122, 125.

drawing its fire upon particular, offensive, aspects of the foreign status, and by calling in aid the limiting factor of judicial discretion, now assumed the appearance of an absolute discretion to disregard foreign law which is applicable and not as such contrary to English public policy.

However, the wording of the pronouncements by Lord Evershed M.R.²⁴ and Donovan L.J. (as he then was)²⁵ shows that they were moved by Rules 28 and 29 of Dicey's *Conflict of Laws*²⁶ which read:

... the existence of a status under the law of a person's domicile is recognised by the court, but such recognition does not necessarily involve giving effect to the results of such status. The court will not give effect to the results of a status existing under a foreign law which is penal.

These rules embody the principles enshrined in *Worms v. De Valdor*²⁷ and *Re Selot's Trusts*.²⁸ According to the individual preference of interpretation put upon these two cases, such incidents of foreign status which are penal or procedural²⁹ may be disregarded, without affecting the recognition of the status itself.

No such restrictive meaning can be attributed to the pronouncements in *Gray (Formosa) v. Formosa*.³⁰ Here a decree of nullity of marriage was refused recognition, although as a decree *in rem* its validity could not be questioned, unless the foreign court lacked jurisdiction or was induced by fraud to assume jurisdiction or violated natural justice.³¹ In proceedings for divorce, natural justice was formerly thought to have been violated if the court assumed jurisdiction although the respondent failed to receive sufficient notice of the proceedings because the petitioner falsely stated that he was ignorant of the respondent's address.³² It was never believed that the court in England could refuse to recognise a foreign decree on the ground that the foreign court had exercised a choice of law which conflicted with English rules of Private International Law or that the rules of foreign law, applied by the court abroad, differed from those of English law.

However, in *Gray (Formosa) v. Formosa*,³³ the Court of Appeal did just this by refusing to recognise a Maltese decree of nullity of an English secular marriage on the ground that the Maltese party

²⁴ At pp. 554-555.

²⁵ At pp. 557-558.

²⁶ 7th ed., (1957), p. 225; see now (8th ed., 1967), pp. 225-231.

²⁷ (1880) 49 L.J.Ch. 261.

²⁸ [1902] 1 Ch. 488.

²⁹ (1880) 49 L.J.Ch. 261, 262; [1902] 1 Ch. 488, 492.

³⁰ [1963] P. 259.

³¹ Dicey, *Conflict of Laws* (8th ed., 1967), pp. 317-318, 376-377.

³² Dicey, Rule 40 (4), pp. 318-319.

³³ [1963] P. 259, followed to this extent by *Lepre v. Lepre* [1965] P. 52.

lacked capacity to marry otherwise than in religious form. Leaving aside the possibility that in the view of the court English law should have been applied to determine capacity, either because the husband was domiciled in England at the relevant time or in deference to the time-honoured, though discredited rule in *Sottomayor v. De Barros* (No. 2),³⁴ because the wife was domiciled in England, where the marriage took place, the only possible reason is that English law does not require a compulsory religious marriage. The result, as has been pointed out,³⁵ is that according to the present practice a foreign decree based on the incapacity of a Jewess to marry a Christian³⁶ or on the celebration of a religious marriage ceremony, when the local law required a civil marriage, can be recognised. Equally a religious marriage abroad, sufficient according to the personal law of the parties and the *lex fori*, but insufficient according to the *lex loci celebrationis*, can be regarded as invalid.³⁷ But when the decree involves an English secular marriage and a personal law requiring a religious marriage, such a law must be disregarded, and a decree based on such a law cannot be tolerated in England and must not be recognised.³⁸

It is difficult to accept this result, or the reasoning on which it is based. Lord Denning M.R.³⁹ relied on English ideas of justice, Donovan L.J. (as he then was) on a residual discretion to avoid flagrant injustice,⁴⁰ while Pearson L.J. (as he then was) found support in *Pemberton v. Hughes*,⁴¹ where it was said that “our courts never inquire whether a competent foreign court has exercised its *jurisdiction* improperly, provided that no *substantial injustice* according to our notions has been committed” (italics mine). It may be asked whether the concern with the exercise of jurisdiction expressed in *Pemberton v. Hughes* does not extend to the proviso as well and whether its extension to the application of foreign law was ever envisaged. Be that as it may, it remains surprising that a foreign law governing capacity to marry which is satisfied by an additional religious marriage ceremony and does not *require* an exclusive religious marriage ceremony should be regarded as shocking.

³⁴ (1879) 5 P.D. 94; Dicey and Morris, Rule 31, Exception 3, pp. 269-270, supported by Cotton L.J. in *Sottomayor v. De Barros* (No. 1) (1877) 3 P.D. 1, at p. 7, where he said: “No country is bound to recognise the law of a foreign state when they work injustice to its own subjects.” See also *Cheni v. Cheni* [1965] P. 85, at p. 98.

³⁵ Dicey and Morris, p. 370.

³⁶ *Corbett v. Corbett* [1957] 1 W.L.R. 486.

³⁷ *Berthiaume v. Dastous* [1930] A.C. 79.

³⁸ It is interesting to note that in the 7th ed. (1958) of Dicey, at p. 57, characterisation is illustrated by reference to this example.

³⁹ At p. 269.

⁴⁰ At p. 270.

⁴¹ At p. 27, citing [1899] 1 Ch. 781, at p. 790, approved in *Salvesen* (or *von Lorang*) v. *Administrator of Austrian Property* [1927] A.C. 641, at pp. 659, 663.

Perhaps it was regarded as shocking because one of the spouses was domiciled in England at the time of the marriage there and because the latter's expectations were defeated. This would elevate the rule in *Sottomayor v. De Barros* (No. 2)⁴² to a principle of English public policy, might eliminate the rule in *De Massa v. De Massa*⁴³ and in *Galene v. Galene*,⁴⁴ and could enlarge the range of limping marriages by disregarding foreign incapacities of a religious⁴⁵ or family nature unknown to English law.

(6) Preliminary Question and Datum

It has been known for a long time that different aspects of a case involving foreign elements may be governed by different systems of laws (*dépeçage*). Thus the form of a marriage is governed by the *lex loci celebrationis* and capacity by the law of the respective domiciles of the parties. Sometimes these various aspects may have to be considered in the same case, and at times they may be connected by a relationship in which one of the aspects is of primary importance because it embodies the substance of the claim, while another affects the solution because it answers a preliminary or incidental question. Thus a claim to share in the estate of a deceased may depend upon the legitimacy of the claimant, upon the validity of a marriage to the deceased or of an adoption. The validity of a marriage may depend upon the validity of a previous divorce, and the legitimacy of a child may in turn depend upon both.

Until the beginning of the 1930s all these questions were regarded as posing essentially the same problem, namely, what law applies to each individual aspect of the case according to the rules of private international law of the *forum*. Following the researches of Melchior⁴⁶ and Wengler,⁴⁷ Robertson introduced the problem in England⁴⁸ whether the choice of law for the solution of a preliminary or incidental question was to be determined, not by the conflicts rules of the *lex fori*, but of the *lex causae* of the principal question.⁴⁹

The English cases are inconclusive, since the *lex fori* always

⁴² (1879) 5 P.D. 94; cf. Kahn-Freund (1953) 39 *Transactions of the Grotius Society* 39, at p. 53.

⁴³ [1939] 2 All E.R. 150n.

⁴⁴ [1939] P. 237.

⁴⁵ Imposed upon Roman Catholics not only in Malta but also in Spain, Código civil, art. 42; also in Greece, Civil Code, art. 1367.

⁴⁶ *Die Grundlagen des deutschen internationalen Privatrechts* (1932), p. 249 *et seq.*

⁴⁷ (1934) 8 *Rabels Z.* 148; (1963) 17 *Dir.Int.* I, 50. See also van Hoogstraten in *Mélanges Kollwijn* (1962), p. 209; Lagarde, *Rev.crit.d.i.p.* 1960, 459, with further lit. at n. 1. For a survey, see Voskuil (1965) 19 *Dir.Int.* I, 183.

⁴⁸ *Characterization in the Conflict of Laws* (1940) 135-156; (1939) 55 L.Q.R. 565, at p. 584.

⁴⁹ It is generally agreed that neither the domestic law of the *forum* nor that of the *lex causae* can furnish the solution.

coincided with the *lex causae*.⁵⁰ A choice between the two alternatives raises not only a technical question, however, but one of practical importance. If the Private International Law of the *lex fori* applies, the individual substantive question which forms the object of the preliminary or incidental question in the case before the court will be determined uniformly in the *forum*, irrespective of whether or not the substantive problem arises as a principal or as a preliminary question. If the Private International Law of the *lex causae* governing the principal question applies, the individual substantive question which forms the object of the preliminary or incidental question in the case before the court will be determined differently according as the substantive problem is raised as a principal or as an incidental question. In the former case the Private International Law of the *forum*, in the latter the Private International Law of the *lex causae* applies. It would seem that the second alternative is to be preferred. Excessive importance should not be attached to the result that the same substantive question is determined by a different legal system as the circumstances lay in which it is raised before the court, even if the same person may thus be legitimate for one purpose and not for another. Such was the result of the decisions of the Canadian courts in *Schwebel v. Ungar*,⁵¹ although the reasons given here are not adduced expressly.

It may be asked why this problem is raised when a preliminary or incidental question comes up for decision, and not in other situations calling for the application of foreign law. It must be remembered that the alternative as to whether one system of foreign law or another is to be applied can be considered only if one party pleads the law of country A, while the other pleads that of country B. This would appear to be a possibility in one of three situations.

⁵⁰ *Birtwhistle v. Vardill* (1840) 7 Cl. & F. 940; *Re Wright's Trusts* (1856) 2 K. & J. 595; *Mette v. Mette* (1859) 1 Sw. & Tr. 416; *Brook v. Brook* (1861) 9 H.L.C. 193; *Shaw v. Gould* (1868) L.R. 3 H.L. 55; *Re Goodman's Trusts* (1881) 17 Ch.D. 266; *Re Andros* (1883) 24 Ch.D. 637; *Re Grove* (1888) 40 Ch. D. 216; *Re Bozelli* [1902] 1 Ch. 751; *De Wilton v. Montefiore* [1909] 2 Ch. 481; *Skottowe v. Young* (1871) L.R. 11 Eq. 474; *Atkinson v. Anderson* (1882) 21 Ch.D. 100; *Cantiere San Rocco v. Clyde Shipbuilding etc. Co.* [1924] A.C. 226; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32; *Kahler v. Midland Bank* [1950] A.C. 24. In the case of suretyship Voskuil, p. 192, distinguishes between preliminary and incidental questions.

⁵¹ [1963] 37 D.L.R. (2d) 467; (1964) 42 D.L.R. (2d) 622, 633; [1964] O.R. 430, 441 (C.A.) [1965] S.C.R. 148, [1965] 48 D.L.R. (2d) 644. The decision could have been supported on another ground, drawn from the principle of the conflict of laws in time: see Lipstein (1967) 2 Ottawa L.R. 49, 56, relying on arguments developed in [1967] C.L.J. 42. If this approach had been chosen, the problem would have involved two principal questions of equal standing, i.e., the recognition of a divorce in Italy of Hungarian domiciliaries and the capacity to marry of a person domiciled in Israel who had been divorced, on the strength of a decree recognised in Ontario. See also Lysyk (1965) 43 Can. Bar Rev. 365; Webb (1965) 14 I.C.L.Q. 659.

- (1) One single legal question only is in issue—*e.g.*, as to what law governs a succession. Here the view was taken above that in principle the *lex causae* including its rules of Private International Law should be taken into account unless the *lex fori* includes *renvoi* expressly; the reasons are set out above.⁵²
- (2) Several legal questions are in issue—*e.g.*, because claimants to the estate of a deceased person rely in part on the law governing matrimonial property relations and in part on the law governing the succession. These legal questions are of equal importance and independent of each other. Although it would be desirable to dovetail the results which follow from the application of one legal system to determine the question based on the matrimonial property régime and another based on the law of succession, no technical manipulation of the rules of Private International Law can achieve this harmony; sometimes the process of adaptation may help.⁵³
- (3) Several legal questions are in issue, of which all but one form preliminary or incidental questions.

It has been shown above that in these circumstances problems of substitution may occur (such as when a right of succession depends upon the validity of a foreign adoption). But in such a case the selection of the law applicable has taken place already. The question for discussion here arises at an earlier stage, if at all. To take a classic example: the court in England is called upon to determine the following case: the *de cuius*, a Greek national who died domiciled in Greece leaving movables in England, had married the claimant in a civil marriage ceremony in England. According to Greek law, a Greek national who is a member of the Greek Orthodox Church cannot marry otherwise than in a Greek Church, and the marriage is void. Consequently the claim of the wife fails. If English Private International Law is applied to both questions, the succession is governed by Greek law as the *lex ultimi domicilii*, and the validity of the marriage is (possibly) governed by English law as the *lex loci celebrationis*.⁵⁴ It is conceivable, however, that the requirement of a religious marriage ceremony laid down by Greek law is to be characterised as a matter of capacity—and Greek law is applied to this question as well. The same result will be reached if the *lex causae* governing the succession (*i.e.*, Greek law) including its rules of Private International Law is applied. In these circumstances a functional characterisation renders the need unnecessary to rely on the conflict rules of the law governing the main question. A further

⁵² Above section (4).

⁵³ See above the observations on the problem of adaptation.

⁵⁴ See Wolff, *Private International Law* (2nd ed., 1950), ss. 196, 198, pp. 206–209.

advantage of this technique is that it ensures a uniform course of decision in the *forum*, irrespective of whether the question is posed as a main question or as a preliminary question.

The difference in treatment by the conflict rules of the *forum* and of the *lex causae* may however be due to factors other than a difference of characterisation of the preliminary question. Differences in the use and characterisation of connecting factors, in the approach to *renvoi* and possibly in a number of other cases exercise an effect.⁵⁵ Here the question arises whether the *forum* should adhere to its own conflict rule to determine the preliminary question. This must depend not so much on the *lex causae* than on the evaluation of the importance of the conflict rule of the *forum*. If the latter does not express a principle which is of paramount importance to the *lex fori* as a whole, the *lex causae* including its conflicts rules should prevail over those of the *lex fori*.⁵⁶ The principle which has been developed above in connection with *renvoi* can be called in aid a second time.⁵⁷ If, however, the conflicts rule of the *forum* is determined by considerations of paramount importance to the *forum*, the fact that the *lex causae* and its conflicts rule would reach a different result is irrelevant.⁵⁸ The following example may serve as illustrations.

For a long time legitimacy in English law depended exclusively upon the existence of a valid marriage of the parents and was regarded as identical with birth in lawful wedlock according to English domestic, or, later, also according to English Private International Law. Consequently, in *Shaw v. Gould*,⁵⁹ which turned on the legitimacy of issue to take under a will, succession presented the main question: the validity of the marriage of the parents was treated as a preliminary question, since it alone determined legitimacy according to English law. For this purpose the English rules of the conflict of laws were applied to determine its validity, and the further preliminary question whether a previous divorce in Scotland was to be recognised was also determined according to English Private International Law.⁶⁰

The same principle would have been applied if either legitimacy or the recognition of a foreign divorce had arisen as a principal question. In either situation the criteria constituting the operative

⁵⁵ Gottlieb (1955) 33 Can. Bar Rev. 523, 528.

⁵⁶ Lipstein (1967) 2 Ottawa L.R. 49, at p. 58; see also Unger (1957) 43 *Transactions of the Grotius Society* 86, at p. 94.

⁵⁷ Cf. Wolff, *Private International Law* s. 196.

⁵⁸ Wengler (1958) 22 *Rebels Z.* 535, at 544, is more pragmatic.

⁵⁹ (1869) L.R. 3 H.L. 55.

⁶⁰ According to Inglis (1957) 6 I.C.L.Q. 202, at p. 214, *Shaw v. Gould* turned on the validity of the first marriage, and therefore on English law as that of the domicile of the children. However, in this case the presumption of legitimacy would have applied.

facts of the two rules were regarded as being of paramount interest to English law. Today, when legitimacy in English domestic law is no longer determined exclusively by the existence of a valid marriage and when children of voidable,⁶¹ void⁶² or subsequent⁶³ marriages may enjoy this status, the time may have come to regard the intimate link between marriage and legitimacy as severed in English law and to treat them as distinct questions governed by two separate conflicts rules of the *forum*, which concern legitimacy on the one hand⁶⁴ and the validity of the marriage on the other hand.⁶⁵ Also, the time may be ripe to concede to the foreign *lex causae* governing legitimacy the faculty to apply its own criteria for determining legitimacy by applying the conflicts rules of the foreign law governing legitimacy to determine any preliminary questions. The learned editor of Dicey⁶⁵ seeks to rely on either of these criteria as alternatives, but this formulation bars the way to the conclusion that legitimacy and the validity of the marriage of the parents according to English domestic or Private International Law may now be separate questions. It is true that the law governing legitimacy may rely upon the validity of the marriage of the parents, but in this case the validity of the marriage has become a preliminary question to be determined by the conflicts rules governing the main question, namely, legitimacy.⁶⁶ On this view it is no longer possible to state with certainty that a marriage which is valid according to English Private International Law will result in the legitimacy of the children.⁶⁷

The principles developed here may be tested against the instructive example given by Wolff.⁶⁸

An Italian couple (A and B) validly married under all laws concerned is domiciled in England. B obtained from the English court a decree of divorce under English Law on the ground of her husband's adultery. Then both parties marry again in England. Later A goes with his second wife C to Italy, acquires a domicile there and dies leaving movable property in England.

Italian law does not admit or recognise divorces of Italian citizens.⁶⁹ In proceedings in England, the determination of the

⁶¹ Matrimonial Causes Act 1965, s. 11.

⁶² Legitimacy Act 1959, s. 2.

⁶³ Legitimacy Act 1926, s. 1; Legitimacy Act 1959, s. 1.

⁶⁴ See in a different context, but in a similar vein, Melchior, *Grundlagen* p. 260, and notes 3 and 4; Lagarde, *Rev.crit.d.i.p.* 1960, 459, at p. 468, who speaks of "éloignement." And see Wolff, *Private International Law*, paras. 362, 363.

⁶⁵ Dicey and Morris, Rule 60, p. 418.

⁶⁶ Subject to the modifications set out above, see Lipstein in (1954) I *Festschrift für Rabel* 611.

⁶⁷ e.g., a marriage valid in England under the rule in *Sottomayor v. De Barros* (No. 2) (1879) 5 P.D. 94.

⁶⁸ *Private International Law* (2nd ed., 1950), s. 200.

⁶⁹ On 18 December 1970 divorce was introduced in Italy. (Law No. 898 of 1 December 1970). According to art. 3 of the Law, a marriage abroad after a decree of divorce granted abroad will be recognised in respect of parties subject to Italian law.

preliminary question whether B or C is the wife of the *de cuius* entitled to a share in his estate, if made in accordance with the rules of Private International Law of the main question, must result in the recognition of B as the sole wife of A. It would seem, however, that where a marriage entered into in England after a divorce there is concerned, English courts will determine the validity of such a marriage according to the English rules of Private International Law. The grant of a decree of divorce in England, followed by a marriage ceremony here, especially if the other spouse is domiciled in England, appears to justify the paramountcy of English law including English Private International Law. It is true that the opposite conclusion was reached in *R. v. Brentwood Superintendent Registrar of Marriages, ex p. Arias*⁷⁰ but even a superficial analysis shows, first, that the divorce in question was granted abroad and that neither party to the intended marriage appears to have been domiciled in England.⁷¹ However, the Hague Convention of 1968 on the Recognition of Foreign Divorces⁷² has created a régime of the type advanced here.⁷³ Incidental or preliminary questions in the conflict of laws have hitherto been regarded as restricted to questions of private law. However, this is not necessarily so, for they may also involve matters outside private law which are commonly said to be of a public law nature. In this case the preliminary question may be said to constitute a datum, seeing that foreign public law cannot be applied.⁷⁴ Thus a foreign rule of the road or of the high seas⁷⁵ may have to be taken into account in order to determine whether or not a person whose liability is governed by another legal system has offended against a standard of care. Similarly, in order to ascertain whether a foreign pilot was a compulsory pilot it may be necessary to examine whether according to foreign law a duty existed to accept the pilot and to submit to his orders,⁷⁶ and a foreign prohibition forbidding the performance of certain transactions may excuse the failure to perform a contract governed by English law.⁷⁷ The question has been put whether

⁷⁰ [1968] 2 Q.B. 956.

⁷¹ *Ibid.* p. 966, 967.

⁷² s. 11. For the text, see (1969) 18 I.C.L.Q. 658. It has been incorporated in the English Recognition of Divorces and Legal Separations Act 1971, s. 7.

⁷³ *Cf.* Lipstein, (1967) 2 Ottawa L.R. 49.

⁷⁴ See Lipstein, *Ius Privatum Gentium* I (1969) 411, at pp. 420-421.

⁷⁵ *The Halley* (1868) L.R. 2 P.C. 193, at p. 203; *cf.* *S.S. Diana, The Cliveden* [1894] A.C. 625, 629; *The Youri v. The Spearman* (1885) 10 App.Cas. 276; *The Talabot* (1890) 15 P.S. 194; *The Kaiser Wilhelm der Grosse* [1907] P. 36, 43-44; *The City of Berlin* [1908] P. 110.

⁷⁶ *The Augusta* (1887) 57 L.T.R. 326, 327; *The Darlington* [1903] P. 77, 78, 80; *The Prinz Hendrick* [1899] P. 177, 181; *The Guy Mannering* (1882) 7 P.D. 132, 135; *The Agnes Otto* (1887) 12 P.D. 56, 57; *The Andoni* [1918] P. 14, 18; *The Waziristan* [1953] 2 All E.R. 1213; *The Peerless* (1860) Lush. 30; *The Arum* [1921] P. 12, 18, 20.

⁷⁷ *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287.

the last-mentioned conclusion reflects the respect for a foreign datum⁷⁸ or an English rule of the conflict of laws.⁷⁹ While the practical consequence is the same, no matter which explanation is preferred, if the contract is governed by English law, it is of importance when the contract is governed by a foreign legal system other than that of the place of performance. If the prohibition in the country of performance is taken into account by an English court, because an English rule of the conflict of laws so requires, the result must be the same if the contract is governed, *e.g.*, by French law. But if the prohibition is treated as a datum, it can only be taken into consideration if the law governing the contract attaches consequences to it.

The answer to the question of which solution is the correct one must depend upon whether or not a prohibition by the law of the place of performance is regarded as so intimately linked to the contract and thus to the law governing the contract that it must be treated as a preliminary or incidental question. On the other hand, if such a prohibition is regarded as always relevant in an English court, no matter whether the contract is governed by English or foreign law, it is obvious that a separate English rule of the conflict of laws is required. The present attitude of English law, as it is evidenced by the decision of the House of Lords in *Regazzoni v. Sethia*,⁸⁰ is not clear, but the second view deserves full consideration.⁸¹

(7) *Conflict of Laws in Time*

Although the problems raised by the time factor have come before the courts over a long period, the literature has been attracted by them only recently.⁸² In substance there are three: changes in the conflicts rule of the forum, changes in the connecting factor and changes in the *lex causae*. Of these, changes in the *lex causae* present much the most important and difficult problems of time in the conflict of laws, especially when the change purports to have retrospective effect.⁸³ It is generally believed that the *lex causae* should be applied

⁷⁸ Mann (1937) 18 B.Y.I.L. 97, 107-113; Falconbridge, *Conflict of Laws* 387, pp. 391-394; Morris (1953) 6 Vanderbilt L.R. 505 at 510; Rabel II, 536; Cheshire and North 228-229. See also Serick (1953) 18 *Rebels* Z. 633, 647 with reference to the decision of the German Supreme Court RGZ 161, 296, 300; 93, 182, 184 and the lit. cit. in n. 79.

⁷⁹ Dicey and Morris, Rule 132, Exception, pp. 761-762.

⁸⁰ [1958] A.C. 301.

⁸¹ Morris (1953) 6 Vanderbilt L.R. 505, at p. 510 with references.

⁸² See Dicey and Morris, p. 40, n. 1, with lit., esp. Mann (1954) 31 B.Y.I.L. 217; Grodecki (1959) 35 B.Y.I.L. 58.

⁸³ Dicey and Morris, p. 44. Cf. Mann, 217, at p. 219. In reality the so-called retroactive effect discussed by writers resolves itself into two separate effects. Either the subsequent legislation purports to affect *ex nunc* the previously existing situation (*e.g.*, s. 8 (1) of the Legitimacy Act 1926) or *ex tunc*. Only the

in its entirety,⁸⁴ and much thought has been expended by writers on domestic private law to determine in what circumstances supervening legislation is to be applied, with or without retroactive effect, to situations which have materialised previously, in the absence of specific indications that the rule is to have retrospective effect. The results of this investigation in what may be called the two-dimensional field can be put to use where the situation becomes three-dimensional through the addition of space in the form of rules of Private International Law.⁸⁵ If it is admitted at the outset that in the sphere of one legal system alone, subsequent legislation applies to past occurrences, if they represent a continuous relationship,⁸⁶ the question whether such subsequent legislation applies in space presupposes, once again, that the relationship is continuous. If it is not, as for instance in the case of a succession where the law of the domicile of the deceased at the time of his death operates upon the death and because of it, or in the law of tort where the *lex fori* and to a certain extent the *lex loci delicti*, are determining, any subsequent legislation must be disregarded,⁸⁷ because it does not apply to an event which has spent itself and does not constitute a continuous relationship. At the same time it must be remembered that even where a relationship is continuous, subsequent legislation may not be applicable because it may have to be characterised differently, with the result that the subsequent legislation is covered by another rule of the conflict of laws, and that some other legal system applies.⁸⁸ If these principles are accepted, Paraguayan law as it stood at the death of the deceased was applied correctly to a will in *Lynch v. Government*

latter effect can properly be regarded as retroactive. Thus two different questions arise: the first is whether the law applies to an existing legal relationship and, secondly, whether it applies *ex tunc*. The former involves a question of the conflict of laws in time; the latter involves the interpretation of domestic law found to apply to an existing legal relationship. No retroactive effect was envisaged by the statutes in issue in *Lynch v. Government of Paraguay, Re Aganoor's Trusts* and *Nelson v. Bridport* (see *infra*).

⁸⁴ Critical Wengler (1958) 23 *Rebels Z.* 535, 552, 558 *et seq.*

⁸⁵ See my review of Roubier, *Le droit transitoire* (2nd ed., 1960) in [1961] C.L.J. 123. The term is used in a simpler sense than that adopted by Mendes da Costa (1958) 7 I.C.L.Q. 217, 251.

⁸⁶ e.g., contracts, matrimonial relations both of a personal and of a proprietary nature and other family relationships. For the use of this distinction, see Wengler (1958) 22 *Rebels Z.* 535, 543; for its practical application, see *Parkasho v. Singh* [1968] P. 233.

⁸⁷ Unless a positive rule of Private International Law requires the contrary, as does the rule in *Phillip v. Eyre* (1870) L.R. 6 Q.B. 1, at p. 28.

⁸⁸ Wengler (1958) 23 *Rebels Z.* 535; *Adams v. National Bank of Greece S.A.* [1961] A.C. 255, and see Lipstein [1960] C.L.J. 169. The objection that the reference to the domicile "at the time of his death" refers to the connecting factor domicile is irrelevant in the present context, which concerns a different problem. *Ca. Dicey and Morris*, p. 46, with lit. n. 37; Mann, *loc. cit.*, p. 234, but see pp. 237, 242; Grodecki, *loc. cit.*, p. 66; Makarov (1957) 22 *Rebels Z.* 200, who speaks of the "petrification" of the law applicable. But see Wengler, *loc. cit.*, at pp. 548, 554. And see *In the Estate of Musurus* [1936] 2 All E.R. 1666, with a note by M. Schoch (1939) 5 *Giur.Comp.d.i.p.* n. 103, p. 308.

of *Paraguay*⁸⁹ for both reasons indicated above: the death crystallised the law of succession, and the subsequent legislation had to be characterised not as falling within the field of succession but of expropriation. The latter was governed by the *lex situs*, English law, and not by the law of the last domicile of the deceased, which was Paraguayan.⁹⁰

With equal justification Austrian law at the time of the death of the testatrix was applied in *Re Aganoor's Trusts*,⁹¹ although the will contained a settlement in the nature of substitutions which were invalidated by subsequent legislation by the Italian successor state. The fund was situated in England, where it had been paid into court and where successive interests were lawful. Thus the will, valid according to the law of the testatrix's domicile at the time of her death, could be given effect in England, since the *lex situs*, English law, which determined the nature of the proprietary interests in the hands of the beneficiaries, allowed interests in the nature of substitutions.⁹² On the other hand, in *Nelson v. Bridport*⁹³ Sicilian law as it stood at the time of the action (and prohibited substitutions) and not as it stood at the time of the testator's death (when substitutions were lawful) was applied to a settlement of land in Sicily. However, Sicilian law was both the law governing the succession and the *lex situs* governing the nature of the proprietary interests in the hands of the beneficiaries. Thus a subsequent change of Sicilian law changing the nature of the proprietary interests created some time previously and now vested in the successors had to be noticed because proprietary rights are governed by the *lex situs*, irrespective of the validity of the will. The latter remained valid but had become ineffective. Thus the popular contention that *Re Aganoor's Trusts*⁹¹ and *Nelson v. Bridport*⁹³ are conflicting decisions cannot be supported.

Both cases show once again that subsequent legislation which modifies previous law may have to be characterised differently from the law which it purports to modify. The former may concern a question of succession, the latter may vary the nature of proprietary interests available to be held *inter vivos*, or it may involve expropriation (as in the case considered first). The *lex situs* applies as the law which determines the nature of permitted proprietary interests.

⁸⁹ (1871) L.R. 2 P. & D. 268, esp. p. 272.

⁹⁰ See now *Bank voor Handel etc. v. Slatford* [1953] 1 Q.B. 248, at p. 257 *et seq.* Diplock L.J. in *Adams v. National Bank of Greece and Athens* [1958] 2 Q.B. 59, 76, 77, but see Lord Reid in *Adams v. National Bank of Greece S.A.* [1961] A.C. 255, 282.

⁹¹ (1895) 66 L.J.Ch. 521.

⁹² *Ca. Dicey and Morris*, p. 45; Mann 234, who argues that Italian law altered the beneficial interests in the trust fund. According to the view taken here it altered the nature of proprietary interests in general capable of being held according to Italian law as the *lex situs*. See also Grodecki, 69.

⁹³ (1846) 8 Beav. 547.

The fact that the succession as such may also be governed by the *lex situs* should not be allowed to obscure this insight, and *Re Aganoor's Trusts*⁹⁴ serves to confirm it, for here the *lex situs* was not identical with the *lex successionis*.

For the purpose of ascertaining what interests have devolved on the death of the deceased the law applicable to successions must be applied as it stood at the time of the death, when the estate crystallised. Any charge of "petrification" is inappropriate since the *lex situs* can impose modifications of the proprietary interests in the hands of the beneficiaries at any time.

*Phillips v. Eyre*⁹⁵ does not add anything to the discussion by holding specifically that in matters of tort the *lex loci delicti* at the time of the act and subsequently must be taken into consideration in so far as it authorises, enjoins or ratifies the act. If according to English Private International Law the *lex loci delicti* as such determined liability in torts for acts committed abroad, the *lex loci delicti* at the time of the act and not at the time of the suit would have to apply, since the cause of action arises from a single act and not from a continuous relationship.⁹⁶ In fact, the *lex fori* applies and the *lex loci delicti* has always been resorted to for the limited purpose of justification only. *Phillips v. Eyre*⁹⁴ confirms a special rule designed to discourage gold-digging actions in England based on English law, if at any time the act committed abroad was or became justifiable abroad.⁹⁷

It is evident that contracts, since they constitute a continuous relationship until performed, are subject to any subsequent changes in the law applicable.⁹⁸ Of course the position is different if foreign law is only incorporated into a contract which is, itself, governed by some other legal system.⁹⁹

*Starkowski v. Att.-Gen.*¹ may be regarded as illustrating that a single act, namely the formal celebration of a marriage, which has spent itself,² is governed by the law of the place of celebration at the time when the marriage took place, but may be affected by subsequent legislation in certain circumstances notwithstanding the fact that it is not a continuous relationship. The reason may be that the parties to the act have remained 'subject to the legal system

⁹⁴ (1895) 66 L.J.Ch. 521.

⁹⁵ (1870) L.R. 6 Q.B. 1, 28.

⁹⁶ Lipstein in *Ius Privatum Gentium* I (1969) 411, at p. 426, and note 88 with lit.

⁹⁷ *Ibid.*, pp. 411, 422.

⁹⁸ *R. v. International Trustee for the Protection of Bondholders A.G.* [1937] A.C. 500, and the cases cited in Dicey and Morris, p. 47, n. 44; Grodecki, *loc. cit.*, p. 78. See also Wengler (1958) 23 *Rabels Z.* 335, at p. 355.

⁹⁹ *Cf. Rossano v. Manufacturers' Life Insurance Co.* [1963] 2 Q.B. 352, 362.

¹ [1954] A.C. 155; see Mann, *loc. cit.*, p. 243.

² *Ca. Mann, loc. cit.*, pp. 242, 244, who stresses the continuance *de facto* of the marriage; Grodecki, p. 72.

concerned through the operation of another, subsidiary, connecting factor (such as domicile etc.).³ In *Starkowski v. Att.-Gen.* the marriage ceremony was celebrated on 19 May 1945 in Austria. At that time it was invalid according to Austrian law, but on 30 June 1945 it was potentially validated by subsequent Austrian legislation. The parties, Polish refugees, left Austria in July 1945.⁴ It may be said, therefore, that when the subsequent legislation was enacted, the marriage of the parties was still exclusively subject to Austrian law, because the parties were still resident there. In short, their legal position at that time was still two-dimensional, Austrian law applied to them, and the only question was whether it purported to operate *ex nunc* or *ex tunc*.⁵ By removing themselves in time they could have frustrated the purpose of the new law, in so far as it purported to affect them, by transforming the problem, from one of pure domestic law into one of conflict of laws in time.

II

While it has been possible to show that during the last fifty years the theory and the general principles of English Private International Law have been refined and analysed, the most dynamic developments affected particular aspects of the conflict of laws. At the beginning of our period it could be said that the English rules of the conflict of laws were among the most orthodox. Today, thanks to a vigorous revival of interest in this subject, they are again in the forefront of development.

(8) *Domicile*

The concept of domicile as a connecting factor and its application have undergone little change, despite official efforts to modify its proof and some of its dependent rules.⁶ Nor has the tendency, noticeable in recent Hague Conventions, to rely on the notion of habitual residence,⁷ exercised much influence as yet, but the incorporation of the Conventions on the Form of Wills of 1961 and on

³ See Wengler, *loc. cit.*, at pp. 535, 560.

⁴ [1954] A.C. 155, 157, and see pp. 169, 172 (Lord Reid: "remedial legislation was promptly enacted"), pp. 173, 176 (Lord Tucker) p. 177 (Lord Asquith of Bishopstone)—but see Mendes da Costa, p. 256.

⁵ Mendes da Costa, p. 257 overlooks this point, but states rightly (at p. 254) that the court did not rely clearly on the time when the subsequent legislation came into force, but did not either rely wholeheartedly on the time when the marriage was registered subsequently.

⁶ Dicey and Morris, p. 118; First Report of the Private International Law Committee (1954) Cmd. 9068; Seventh Report (1963) Cmnd. 1955.

⁷ See Lipstein [1965] C.L.J. 224, at p. 225, and note 3; Wills Act 1963, s. 1; Recognition of Divorces and Legal Separations Act 1971, s. 3.

Adoption of 1965⁸ has posed the question. However, the Convention on the Recognition of Divorces and Legal Separations of 1970, which relies heavily on this connecting factor⁹ has introduced a concession¹⁰ to common law countries by allowing the country where the matrimonial cause is tried to substitute the notion of domicile for that of habitual residence in determining its jurisdiction under the Convention.¹¹ This makeshift solution does not appear to have eliminated the problem altogether in so far as English courts are concerned. It would seem that where a divorce pronounced in a Convention country comes up for recognition in England, the courts in England must accord recognition if, on the facts found abroad, the prerequisites for a finding of domicile have been found to be present by the foreign court, even if they would not have supported a finding of domicile according to English notions.¹²

The domicile of origin retains its strong attractive force; it is less easily abandoned than a domicile of choice,¹³ and the acquisition of a first domicile of choice is correspondingly more difficult to achieve.¹⁴ Of late, considerations which gave rise to the adoption of the notion of an Anglo-Indian domicile¹⁵ have been resurrected with a different geographical denominator.¹⁶ The transition from a domicile of dependence of a minor to a domicile of his own has been elucidated¹⁷ and the change of a residence of a soldier or official in virtue of an office or duty to that of a domicile of choice has been made possible.¹⁸

(9) *Marriage and divorce*

In the field of matrimonial relations, polygamous marriages have attracted attention¹⁹ perhaps to a greater degree than their importance and frequency within English legal life justifies.

⁸ See the Convention on the Form of Wills, art. 1 (d), Wills Act 1963, s. 1; Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoption of 1965, see arts. 2, 3, 7; Adoption Act 1968, s. 11.

⁹ Art. 2.

¹⁰ Art. 3.

¹¹ Art. 3.

¹² This conclusion seems to follow from art. 6, last para. of the Convention and is apparent from s. 3 (2) and s. 5 (2) of the Act of 1971 (above p. 100, n. 7).

¹³ *Re Lloyd Evans* [1947] Ch. 695; *Re Flynn* [1968] 1 W.L.R. 103, 112-115 [1968] 1 All E.R. 49, 56-58; *Qureshi v. Qureshi* [1971] 2 W.L.R. 518, 530.

¹⁴ Leaving aside the cases influenced by conditions in wartime; see *May v. May* (1943) 168 L.T. 42; *Cruh v. Cruh* [1945] 2 All E.R. 545.

¹⁵ Laid to rest in *Casdagli v. Casdagli* [1919] A.C. 145.

¹⁶ *Qureshi v. Qureshi* [1971] 2 W.L.R. 518, 531-533.

¹⁷ *Harrison v. Harrison* [1953] 1 W.L.R. 865; *Henderson v. Henderson* [1967] P. 77.

¹⁸ *Donaldson v. Donaldson* [1949] P. 363. *Cruickshanks v. Cruickshanks* [1957] 1 W.L.R. 564; [1957] 1 All E.R. 889; *Stone v. Stone* [1958] 1 W.L.R. 1287; [1959] 1 All E.R. 194; *Sears v. Sears* (1962) 106 S.J. 529.

¹⁹ Beginning with articles by Beckett (1932) 48 L.Q.R. 341; Vesey-Fitzgerald (1931) 47 L.Q.R. 253; (1948) *Current Legal Problems* 222 *et seq.*; Morris (1952-53) 66 Harv.L.R. 961; *Festschrift für M. Wolff* (1952) 287-336, and others.

Polygamous marriages are recognised, except as a basis for the initiation of matrimonial proceedings in England.²⁰ Their nature remains initially determined by the *lex loci celebrationis*, but their validity in substance is now known to depend upon the capacity of the parties to enter into such a union²¹ and their future character may depend upon it too. It is accepted that an initial incapacity of a husband to enter into a union enabling him to marry more than one wife renders the union void, even if he never marries more than one wife.²² Today, it may be that such a union is monogamous from the beginning, since it has been decided that a valid polygamous union *becomes* monogamous upon a change of domicile to a country which prohibits polygamy. Yet it seems to be acknowledged that the character of a marriage celebrated in England between parties who are both capable of entering into a polygamous marriage is determined exclusively by English law, the *lex loci celebrationis*, and is monogamous.²³ It may be that English law is not disposed to allow the conclusion of other than monogamous marriages in England, but it has never been possible to neglect the fact that a husband domiciled in a foreign country permitting polygamy can, by going there, acquire one or more partners who are his lawful wives.²⁴ The question remains whether in these circumstances the marriage is not only monogamous, but a valid monogamous marriage. If the answer is in the affirmative,²⁵ the valid conclusion of a second marriage by the husband in the country of his domicile would have to be treated as adultery. It may be doubted whether a decree of divorce could be granted in England, seeing that adultery as such is no longer a ground for dissolving a marriage,²⁶ and since it can hardly be argued that it is intolerable for a woman, the law of whose matrimonial domicile permits polygamy, to find that she is not the sole wife.²⁷ In practice the special legislation in India and Pakistan regulating the conclusion of monogamous marriages by persons otherwise entitled to marry polygamously probably takes some of the sting out of the problem, but it remains real where the law of the domicile does not provide similar legislation.

²⁰ *Baindail v. Baindail* [1946] P. 122; *Risk v. Risk* [1951] P. 50; *Sowa v. Sowa* [1961] P. 70. But see the proposals of the Law Commission, Report on Polygamous Marriages (Law Com. No. 42 (1971)); *Morris, Conflict of Laws* (1971), p. 128.

²¹ *Morris, loc. cit.*, *Ali v. Ali* [1968] P. 564. ²² *Re Bethell* (1887) 38 Ch.D. 220.

²³ *Qureshi v. Qureshi* [1971] 2 W.L.R. 518, 537, 538; *Pearl* [1971] C.L.J. 41, at p. 43.

²⁴ *Cf. Lendrum v. Chakravarti*, 1929 S.L.T. 96; *McDougall v. Chitnavis*, 1937 S.C. 390.

²⁵ *Cf. Chetti v. Chetti* [1909] P. 67; *Sottomayor v. De Barros* (No. 2) (1879) 5 P.D. 94.

²⁶ Divorce Reform Act 1969, s. 2 (1) (a).

²⁷ For this problem, see now the Law Commission's Report, No. 42 (1971), paras. 42-75.

The greatest changes occurred in the law relating to divorce. At the beginning of our period, English courts only assumed jurisdiction on the basis of domicile,²⁸ and recognised foreign decrees of divorce only if they were pronounced by the courts of the domicile of the spouses²⁹ or were recognised by them.³⁰ The wife shared her husband's domicile for this purpose, even if the spouses were separated.³¹ Today the jurisdiction has been enlarged by statute³² to permit the courts to entertain a petition by a wife who had been deserted by her husband or whose husband had been deported from the United Kingdom, if the husband was domiciled in England immediately before the desertion or deportation,³² or by a wife who is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, provided that the husband is not domiciled in Scotland, Northern Ireland, the Channel Islands or the Isle of Man.³³ Three years' ordinary residence by the wife coupled with the mandatory application of English domestic law³⁴ has increased the danger of limping divorces followed by limping marriages,³⁵ but does not seem to perpetuate any personal incapacity to marry again of a respondent husband who is domiciled in a foreign country where the English divorce, or possibly any divorce whatsoever, cannot be recognised. Even if his capacity to marry is governed by the law of his foreign domicile and if the effect of the English divorce is treated as a preliminary question governed by the foreign *lex domicilii* including its conflicts rule, and not as a separate question, such a husband can probably marry in England, at least within the limits of the rule in *Sottomayor v. De Barros* (No. 2).³⁶ Consequently he is little worse and no better off than the petitioning wife who stands little chance of being able

²⁸ *Wilson v. Wilson* (1872) L.R. 2 P. & D. 435, 441-442; *Harvey v. Farnie* (1882) 8 App.Cas. 43, 50, 57; *Le Mesurier v. Le Mesurier* [1895] A.C. 517, 526-527. The assumption of jurisdiction in favour of a deserted wife whose previous domicile was in England, foreshadowed in *Armitage v. Armitage* [1898] P. 178, 185; *Ogden v. Ogden* [1908] P. 46, 83, and put into practice in *Stathatos v. Stathatos* [1913] P. 46; *De Montaigne v. De Montaigne* [1913] P. 154, did not survive for a number of reasons. Cf. Dicey, *Conflict of Laws* (3rd ed., 1922), Appendix Note 13, p. 826, and Rule 63, Exception, p. 294.

²⁹ *Shaw v. Gould* (1868) L.R. 3 H.L. 55, 69, 79, 83, 87, and the cases cited above, note 28.

³⁰ *Armitage v. Att.-Gen.* [1906] P. 135.

³¹ *Lord Advocate v. Jaffrey* [1921] 1 A.C. 146.

³² Matrimonial Causes Act 1937, s. 13=M.C. Act 1950, s. 18 (1)=M.C. Act 1965, s. 40 (1) (a). And see the Matrimonial Causes Bill 1921; Westlake, *Private International Law* (7th ed., 1925), p. 89; Dicey, *Conflict of Laws* (3rd ed., 1922), App. Note 14, p. 835.

³³ Law Reform (Miscellaneous Provisions) Act 1949, s. 1=M.C. Act 1950, s. 18 (1) (b)=M.C. Act 1965, s. 40 (1) (b).

³⁴ Matrimonial Causes Act 1965, s. 40 (2).

³⁵ For this possibility, see Lord Watson in *Le Mesurier v. Le Mesurier* [1895] A.C. 517, at p. 528; Wolff, *Private International Law* (2nd ed., 1950), para. 358, p. 379 and n. 3.

³⁶ (1879) 5 P.D. 94.

to conclude a second marriage outside England on the strength of the English decree.³⁷ Within a short time the question arose whether this extension of English jurisdiction in divorce is matched by a comparable concession of jurisdiction to other countries. In the short time between 1953 and 1958 the unilateral rules of English statute law were converted into bilateral rules. First, recognition was accorded to decrees based on jurisdictional provisions of foreign law which were substantially identical with those of English law.³⁸ Then the principle of equivalence (falsely called "reciprocity") was adopted, which permitted the recognition of the decrees, if the facts before the foreign court were such that, had they occurred in England, English courts would have been able to exercise jurisdiction.³⁹ Shortly afterwards the restriction, developed in English divorce proceedings, that the court can only exercise this extraordinary jurisdiction on the basis of a petition by the wife to the exclusion of any cross-petition by the husband⁴⁰ was engrafted on the exceptional rule of recognition of foreign divorces.⁴¹ Finally, the House of Lords has indicated a variety of situations⁴² in which foreign decrees will be recognised which seem to express the principle that one of the spouses must have been substantially connected with the country concerned.⁴³

The difficulties arising from the exercise by English courts of an enlarged jurisdiction in divorce were exposed above. They stem

³⁷ For this possibility, see Lord Watson in *Le Mesurier v. Le Mesurier* [1895] A.C. 517, at p. 528; Wolff, *Private International Law* (2nd ed., 1950), para. 358, p. 379 and n. 3.

³⁸ *Travers v. Holley* [1953] P. 246; *Dunne v. Saban* [1955] P. 178; see also *Carr v. Carr* [1955] 1 W.L.R. 422.

³⁹ *Arnold v. Arnold* [1957] P. 237; *Manning v. Manning* [1958] P. 112; *Robinson Scott v. Robinson Scott* [1958] P. 71.

⁴⁰ *Russell v. Russell* [1957] P. 375.

⁴¹ *Leveit v. Leveit* [1957] P. 156 (C.A.).

⁴² Domicile of the spouses, nationality of the spouses with or without qualifications, possibly residence, if coupled with a substantial connection such as nationality even of one of the spouses only; the last matrimonial home, in virtue of the rule in *Armitage v. Att.-Gen.* or of the rule in *Travers v. Holley*. See the analysis in Dicey and Morris, First Supplement to 8th ed. (1968), p. 315; Graveson, *Conflict of Laws* (6th ed., 1969), p. 325; Cheshire and North (8th ed., 1970), pp. 363-365; Morris, *Conflict of Laws* (1971), pp. 143-144.

⁴³ (a) *Travers v. Holley*; *Tijanic v. Tijanic* [1968] P. 181; [1967] 3 All E.R. 976; *Brown v. Brown* [1968] P. 518; (b) habitual residence (1 year) and nationality: *Angelo v. Angelo* [1968] 1 W.L.R. 401; [1967] 3 All E.R. 314; (c) habitual residence (2 plus or 3 years): *Welsby v. Welsby* [1970] 1 W.L.R. 45; [1970] 2 All E.R. 467; (d) if respondent has a real connection with the country: *Mayfield v. Mayfield* [1969] P. 119; [1969] 2 All E.R. 219—see also *Angelo v. Angelo*, *supra* (b); *Turczak v. Turczak* [1970] P. 198; [1969] 3 All E.R. 317; *Brown v. Brown*, *supra* (a); (e) if the petitioning husband formerly had a real connection with the country: *Blair v. Blair* [1969] 1 W.L.R. 221; [1968] 3 All E.R. 639, 642; (f) if the petitioning husband has established a substantial connection of one year's duration through residence: *Munt v. Munt* [1970] 2 All E.R. 516, 518; (g) or if the country with which the wife is connected will recognise the decree given elsewhere: *Mather v. Mahoney* [1969] 3 W.L.R. 1046; [1968] 3 All E.R. 223.

from the severance of domicile as the exclusive basis of jurisdiction in divorce from domicile as the law governing status, including divorce, and the resulting capacity to marry. As was shown above, this severance between jurisdiction and the law governing status does little harm if the jurisdiction in divorce is exercised by the courts in England although the husband is domiciled abroad. The situation is very different if a similarly enlarged jurisdiction is accorded to foreign courts. Even if such decrees will be recognised in England according to the English rules of private international law, their recognition by the law governing the capacity of the parties to marry again cannot be ensured by the same means, unless the parties are domiciled in England.

However desirable in the result, it cannot be contended at present with any degree of authority that the extended recognition of foreign divorces is restricted to decrees dissolving the marriage of parties domiciled in England.⁴⁴ If it were so, the extended recognition which began with *Travers v. Holley*⁴⁵ and culminated in *Indyka v. Indyka*⁴⁶ would be no more than an extension of the rule in *Armitage v. Att.-Gen.*⁴⁷ English law is of course at liberty to regard persons domiciled in England to have been released from the bonds of matrimony by any means or by any courts anywhere in the world which it chooses to recognise. If, however, the recognition is also accorded to such divorces of persons domiciled in third countries, where these decrees are not recognised, the recognition of such divorces in England will be ineffective, if a party to such a divorce wishes to marry again in England; such will certainly be the result if both parties to the marriage are domiciled abroad⁴⁸; and even if the other party is domiciled in England, it may be doubted whether the rule in *Sottomayor v. De Barros (No. 2)*⁴⁹ will help. Moreover, if the validity of a marriage concluded in these circumstances in some foreign country which recognised the divorce and allowed a subsequent marriage were subsequently to become the object of proceedings in England, English courts would have to treat the marriage as void, if the law of the domicile of the divorced party at the time of his subsequent marriage did not recognise the divorce.

⁴⁴ See the literature cited by Lipstein (1967) 2 Ottawa L.R. 49, 54, n. 37.

⁴⁵ [1953] P. 246.

⁴⁶ [1969] A.C. 33.

⁴⁷ [1906] P. 135; consequently *Mountbatten v. Mountbatten* [1959] P. 43 would stand and *Mather v. Mahoney* [1968] 1 W.L.R. 1773; [1968] 3 All E.R. 223 would be wrongly decided. See Lipstein (1967) 2 Ottawa L.R. 49, 54, 56, 70, and see Unger (1957) 43 *Transactions of the Grotius Society* 86, 93-94.

⁴⁸ *R. v. Brentwood Superintendent Registrar of Marriages, ex p. Arias* [1968] 2 Q.B. 956.

⁴⁹ (1879) 5 P.D. 94; the incapacity of the foreign party is not one of a kind to which the English party might not be subject, even if it does not affect the English party in the particular case.

The conclusion to be drawn from this examination is clear: any broad recognition of foreign divorces in disregard of the law of the domicile of the parties, if foreign, will be ineffective to allow the parties to the foreign divorce to marry again in England, *unless* the English rule of Private International Law concerning capacity to marry is changed, at least in part, to permit parties to a foreign divorce, recognised in England, to marry again, even if the law governing their capacity to marry in general does not recognise the decree and prevents a second marriage.

The Hague Convention on the Recognition of Divorces and Legal Separations of 1 June 1970⁵⁰ seeks to achieve this result and to eliminate the pitfalls set out above when it provides (art. 11) that "A State which is obliged to recognise a divorce under this Convention may not preclude either spouse from remarrying on the ground that the law of another State does not recognise the divorce." Once again jurisdiction in matters of divorce and capacity to marry are linked, but with one difference. While formerly jurisdiction was linked to capacity by relying exclusively on the law and the courts of the domicile, the Hague Convention links capacity to jurisdiction by looking to the law and the courts of a variety of countries. The English Recognition of Divorces and Legal Separations Act 1971, s. 7, has given effect to this innovation.

(10) Nullity of marriage

Jurisdiction in matters of nullity of marriage has undergone great changes in the last fifty years. At the beginning of this period, only one rule existed: the courts of the place of celebration have jurisdiction.⁵¹ *Salvesen's* case established the jurisdiction of the courts of the domicile of the parties⁵²; *White v. White* drew the logical consequence and accorded jurisdiction to the courts of either party.⁵³ Writers with "academic sophistry"⁵⁴ and the President of the Probate, Divorce and Admiralty Division with cold practical sense⁵⁵ have maintained this principle in face of attempts to whittle it down.⁵⁶

⁵⁰ Which provides in art. 2 a set of rules for the recognition of foreign divorces which does not differ greatly from those adumbrated in *Indyka v. Indyka* [1969] 1 A.C. 33. For the text, see, e.g., Cmnd. 3991 (1968); (1969) 18 I.C.L.Q. 658.

⁵¹ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Ogden v. Ogden* [1908] P. 46, 57, 67, 75, 76, 78, 80; *Ross-Smith v. Ross-Smith* [1963] A.C. 280; *Padolecchia v. Padolecchia* [1968] P. 314.

⁵² *Salvesen v. Administrator of Austrian Property* [1927] A.C. 641.

⁵³ [1937] P. 11; *Mehta v. Mehta* [1945] 2 All E.R. 690; *Morris* (1946) 62 L.Q.R. 117.

⁵⁴ *Gray (or Formosa) v. Formosa* [1962] P. 259, per Lord Denning M.R. at p. 269.

⁵⁵ *Lepre v. Lepre* [1965] P. 52.

⁵⁶ *Chapelle v. Chapelle* [1950] P. 134.

Common residence was added for historical reasons.⁵⁷ Finally the same statutory extensions as in matters of divorce were introduced here as well.⁵⁸ In 1931 the distinction, known to English domestic law, between void and voidable marriages was transplanted into the conflict of laws, and an attempt, successful for twenty-five years, was made to restrict jurisdiction to annul marriages on the ground that they are voidable to the courts of the domicile of the parties.⁵⁹ The trend has now been reversed and common residence,⁶⁰ though not the place of celebration,⁶¹ confers jurisdiction, which has also been further enlarged by statute.⁶²

The recent trend to rely on the distinction between marriages alleged to be void or voidable is not without danger, both where the jurisdiction of English courts and the recognition of foreign nullity decrees is concerned. When the jurisdiction of English courts is in issue, any grounds of nullity drawn from foreign law have to be translated into the categories of English law. This exercise is not always easy.⁶³ In addition, the question has been debated whether the English choice of law rules which distinguish between the law applicable to formalities of marriage and capacity to marry must be augmented by another, to determine the grounds rendering the marriage voidable. This would rely on the law of the matrimonial domicile, which is that of the husband at the time of the marriage.⁶⁴ It is not clear whether the reference to the law of the matrimonial domicile in the sense described above serves only to determine the jurisdiction of English courts.⁶⁵ According to Dr. Morris⁶⁶ the development from *De Reneville v. De Reneville*⁶⁷ to *Ross-Smith v. Ross-Smith*⁶⁸ shows that English law alone determines whether the marriage is void or voidable. Taken literally, this statement is open to question since it is undoubted that the grounds

⁵⁷ *Ramsay-Fairfax v. Ramsay-Fairfax* [1956] P. 115; *Ross-Smith v. Ross-Smith* [1963] A.C. 280, 311, 317; *Szechter v. Szechter* [1970] 3 All E.R. 905, 912; note that in 1925 the editor of Westlake believed that residence of the respondent was sufficient (p. 94).

⁵⁸ Matrimonial Causes Act 1965, s. 40 (1)=Matrimonial Causes Act 1950, s. 18 (1).

⁵⁹ *Inverclyde v. Inverclyde* [1931] P. 29.

⁶⁰ *Ramsay-Fairfax v. Ramsay-Fairfax* [1956] P. 115; see also *Easterbrook v. Easterbrook* [1944] P. 10; *Hutter v. Hutten* [1944] P. 95; possibly also the residence of the respondent alone; *Magnier v. Magnier* (1968) 112 S.J. 233.

⁶¹ *Ross-Smith v. Ross-Smith* [1963] A.C. 280.

⁶² See above, n. 58.

⁶³ Cohn (1948) 64 L.Q.R. 324, 337, 533; Grodecki (1957) 20 M.L.R. 566, 575; (1958) 74 L.Q.R. 225, 234-235.

⁶⁴ *De Reneville v. De Reneville* [1948] P. 100; Dicey and Morris, Rule 45, pp. 359-367; Morris (1970) 19 I.C.L.Q. 424. In *Ponticelli v. Ponticelli* [1958] P. 204, the law of the husband's domicile at the relevant time coincided with the *lex fori*.

⁶⁵ See Dicey and Morris, *loc. cit.*; Morris, *loc. cit.*, p. 55, n. 5.

⁶⁶ (1970) 19 I.C.L.Q. 424.

⁶⁷ [1948] P. 100.

⁶⁸ [1963] A.C. 280.

on which a petition for nullity may be based can be drawn from foreign law, from the *lex loci celebrationis* or the law of the respective domiciles of the parties, or possibly from that of the husband alone at the time of the marriage, and not merely on English law. Nor need they coincide with those of English law. However, it would seem that the operative facts of the English rule of jurisdiction must be characterised according to English domestic law and not, as is usual in the case of rules of the conflict of laws, on a broader, comparative basis.⁶⁹ This does not dispense the parties from having to plead the foreign law containing the grounds on which they seek to rely,⁷⁰ but they are not obliged to plead it. If they fail to do so, foreign law will be deemed to be the same as English law.⁷¹ Thus parties may be able by pleading or by refraining from pleading the foreign law determining the alleged defect of the marriage as void or voidable to determine the jurisdiction of English courts and, in the end, the outcome of the proceedings. This possibility, which became a reality in the cases cited above, draws attention to a serious danger of *forum shopping*, of miscarriage of justice and of limping nullity decrees.

If the recognition of foreign nullity decrees is made to depend upon the same tests formulated by English domestic law, similar problems of transposing foreign notions of nullity into English categories arise, subject to the important difference that English domestic law can never apply.⁷² Consequently it may be that the English distinctions of voidability and voidness do not apply here. In practice it means that the jurisdiction of the foreign *forum celebrationis* may be recognised in circumstances in which, had they occurred in England, English courts could not have assumed jurisdiction, because the marriage is regarded as voidable.⁷³

⁶⁹ See above, Section (3).

⁷⁰ This may be the law governing the formalities of marriage, the capacity to marry or, possibly the law relating to certain grounds for rescinding the marriage for reasons appearing after the marriage ceremony. All require a formal determination by a court; for a so-called non-marriage not requiring a decree according to foreign law, see *Merker v. Merker* [1963] P. 283; [1963] C.L.J. 50; *Berthiaume v. Dastous* [1930] A.C. 79, as explained by Cohn (1948) 64 L.Q.R. at p. 339. Thus the test should be ideally whether the decree operates *ex nunc* or *ex tunc*, but the wording of the corresponding English decrees precludes this solution. However, see now the Nullity Act 1971, s. 5.

⁷¹ As happened in *De Reneville v. De Reneville* [1948] P. 100; *Hill v. Hill* [1960] P. 130; *Ross-Smith v. Ross-Smith* [1963] A.C. 280; *Easterbrook v. Easterbrook* [1944] P. 10; *Hutter v. Hutter* [1944] P. 95; Falconbridge, *Conflict of Laws* (2nd ed., 1954), pp. 695-698; (1948) 26 Can. Bar Rev. 907, at pp. 915-917; (1944) 22 Can. Bar Rev. 923; F. H. (1944) 60 L.Q.R. 115, 116.

⁷² See *Lepre v. Lepre* [1965] P. 52, 60.

⁷³ *Mitford v. Mitford* [1923] P. 130, and the explanation given by Westlake (7th ed., 1925), p. 57. See the wording of Dicey and Morris, Rule 46, pp. 371, 375, text to note 77, and see *Corbett v. Corbett* [1957] 1 W.L.R. 486, 490. But contrast the conclusions of Sir Jocelyn Simon P. in *Merker v. Merker* [1963] 283, 297, relying on *Ross-Smith v. Ross-Smith* [1963] A.C. 280.

(11) *Contracts*

The law of contract has progressed steadily on lines which were foreseeable fifty years ago. The *quaestio aurea* whether or not free choice of law is possible has been answered by many with different situations in mind. When the parties have not made any express choice of law, it matters little whether the subjective or the objective doctrine is adopted⁷⁴ and the courts have given formal expression to this insight.⁷⁵ A presumed intention is always a hypothetical intention determined objectively.

Nevertheless, the problem is not entirely academic; the objective doctrine seeks to establish the connection of the contract with a particular territorial unit; the subjective doctrine, by implying a choice of law, looks to the connection with a particular legal system.⁷⁶ The latter approach is to be preferred for, as will be shown below, the choice of law to govern a contract may be affected by considerations which are only indirectly connected with the contract itself and wholly independent of the territorial boundaries within which it is intended to operate. The question has a real meaning when the parties have made an express choice. Although it appears to have been solved by the decision in the *Vita Food* case,⁷⁷ the qualifications to the effect that the choice must be bona fide, legal and not against public policy⁷⁸ leave much unanswered. These conditions are negative, but it has never been possible to establish positively the circumstances in which the choice may be exercised. Yet it is not impossible to offer an answer of general validity, once it is realised that freedom to contract and its limits *within a system of domestic law* are only of importance *after it has been decided that the particular system of law applies*. It is a freedom which forms part of substantive domestic law. Freedom to select a particular system of laws as a problem of Private International Law must be considered at a stage which precedes the consideration or application of any domestic rules of law. It can only be exercised if the contract contains a foreign element, either directly in consequence of some personal or proprietary elements, or indirectly because the contract is

⁷⁴ For some differences, see Mann (1950) 3 Internat. Law Quarterly 60, 597, and see Morris, *ibid.*, p. 197.

⁷⁵ *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219; *The Assunzione* [1954] P. 150, 179-180, 194, but see p. 164.

⁷⁶ *Rossano v. Manufacturers Life Ins. Co.* [1963] 2 Q.B. 352, 360-361, 369; *Whitworth Estates v. Miller* [1969] 2 All E.R. 210, 212G, *per* Lord Denning M.R., at p. 215 *per* Widgery L.J.; [1969] 1 W.L.R. 377, 381, 384; but see Lord Wilberforce in the House of Lords: [1970] 1 All E.R. 808D; *Cie. Tunisienne de Navigation S.A. v. Cie. d'Armement Maritime S.A.* [1969] 3 All E.R. 589, at p. 591, *per* Lord Denning M.R.; *cf. Pick v. Manufacturers Life Ins. Co.* [1958] 2 Lloyd's Rep. 93.

⁷⁷ *Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] A.C. 277.

⁷⁸ *Ibid.*, p. 290.

intimately connected with another transaction bearing a foreign character, such as a contract of resale, or of insurance. In short, free choice of law is a connecting factor attached to the operative facts known compendiously as "contract," forming together a rule of Private International Law.⁷⁹ As in the case of any other connecting factor, its adoption and formulation with or without qualifications is a matter of policy to be decided by each country for itself.

In England, experience has shown that disputes as to what law applies are rare when the parties have exercised a free choice⁸⁰ and frequent where they have not. Of course the situation may arise where the contract thus subjected to the law of one country offends that of another. If that law is the *lex loci solutionis* it will be taken into account in so far as the performance of the contract is illegal in that country.⁸¹ If that law is the *lex loci contractus*, the question must be put whether the law of the place of contracting has any claim to preferential treatment. The answer must depend upon the Private International Law of the *forum* which may give precedence to the *lex loci contractus* over the exercise of free choice of law by the parties, and may admit the latter only if the *lex loci contractus* permits such a choice,⁸² thus opening the way to *renvoi*. Free choice of law and the application of the *lex loci contractus* are alternatives which are mutually exclusive. Finally the *lex fori* can always intervene in the guise of rules of public policy, of public law and of procedure.⁸³

(12) Tort

During the last four decades, until *Boys v. Chaplin*⁸⁴ came before the courts in England, the conflicts rule in matters of tort remained firmly that which had been enunciated by Dicey himself and is known as the rule in *Phillips v. Eyre*.⁸⁵ Writers were much intrigued by the niceties of the problems involving torts in the conflict of laws.⁸⁶

⁷⁹ This view was first put forward by Haudek, *Die Bedeutung des Parteiwillens im Internationalen Privatrecht* (1930), p. 5.

⁸⁰ *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277; *The Torni* [1932] P. 78; *Ocean Steamship Co. v. Queensland State Wheat Board* [1941] 1 K.B. 402; *Jones v. Oceanic Steam Navigation Co.* [1924] 2 K.B. 730; cf. *Pena Copper Mines v. Rio Tinto Co. Ltd.* (1912) 105 L.T. 846; *Kirchner v. Gruban* [1909] 1 Ch. 413. And see Lord Wilberforce in *James Miller v. Whitworth Estates* [1970] 1 All E.R. 796, at p. 809B.

⁸¹ *Ralli Bros. v. Cia Naviera Sota y Aznar* [1920] 2 K.B. 287 (C.A.); Dicey and Morris, Rule 132, Exception, pp. 760-766.

⁸² See the observations in Dicey (7th ed., 1958), p. 782, omitted in the 8th ed. (1967), referring to *The Torni* [1932] P. 78 (C.A.). But see the Uniform Laws on International Sales Act 1967, s. 1 (4), which states that no provision of English law shall be regarded as mandatory, in contradistinction to art. 4 of the Convention itself.

⁸³ Dicey and Morris, p. 758.

⁸⁴ [1967] 2 All E.R. 615 (Milmo J.); [1968] 2 Q.B. 1 (C.A.); [1971] A.C. 356 (H.L.).

⁸⁵ (1870) L.R. 6 Q.B. 1, 28, on appeal from (1869) L.R. 4 Q.B. 225.

⁸⁶ See the lit. cited by Dicey and Morris, p. 909, n. 1, and by Lipstein, *Ius Privatum Gentium* I (1969) 411, n. 4.

The function of the *lex fori*, the *lex loci delicti*, a combination of both⁸⁷ and the proper law of the tort all attracted attention. But the working rule remained that the act must be actionable as a tort in England and must not be justifiable abroad. The relationship between the two limbs was never properly resolved, and each situation as it arose was accommodated within the formal framework of the rule, without much regard to its function. In reality, the rule in *Phillips v. Eyre* covers only a negative aspect of the conflicts rule, i.e., where the act complained of is authorised, enjoined or ratified by the *lex loci delicti*.⁸⁸ It leaves the question unanswered as to the legal position if the *lex loci actus* takes a neutral attitude towards the act complained of by not treating it as wrongful.⁸⁹ If more than a neutral attitude of the *lex loci delicti* is required, must a positive condition be fulfilled; must the remedy be the same in substance according to the *lex fori* and the *lex loci*, or is it sufficient if the *lex loci* treats the act as actionable to some extent, even in proceedings other than civil, or does it suffice if the act is criminal only (a situation which in the present state of the law in the world is unlikely to occur)?⁹⁰

Originally jurisdiction in matters of tort and choice of law were co-extensive, subject to some doubts as to whether aliens abroad could be held responsible, if they were not bound to observe the King's Peace.⁹¹ There are indications, if only *obiter*, that as between British subjects (probably, in the meaning of that time, English domiciliaries) an action in England will succeed on the strength of English law alone,⁹² thus letting in the proper law of a tort, restricted to those governed by English law. Implicitly, the problem presents itself whether in all other circumstances some degree of actionability according to foreign law is required.

The *lex fori* in the form of general maritime law was applied by Phillimore J. in the Admiralty Division to determine the liability of shipowners for a Belgian compulsory pilot arising out of a collision in foreign waters which were part of the high seas according to maritime law.⁹³ Foreign and English statute law were both inapplicable.

⁸⁷ *The Mary Moxham* (1876) 1 P.D. 107, 110, 113; *Chartered Mercantile Bank of London, India and China v. N.I. Steam Navigation Co.* (1883) 10 Q.B.D. 521, 536, 537; *The Tolten* [1946] P. 135, 165.

⁸⁸ The following discussion is based on Lipstein in *Ius Privatum Gentium* I (1969) 411-432; see pp. 412, 422-426.

⁸⁹ *Mostyn v. Fabrigas* (1775) 1 Cowp. 161, 176. Such is the problem posed by Lord Pearson [1971] A.C. 394E-F; [1969] 2 All E.R. 1106G-H.

⁹⁰ For Brazilian law, see Rabel, *Conflict of Laws* II (2nd ed., 1960), p. 240; for Neapolitan law in 1862, see Crompton J. in *Scott v. Seymour* (1862) 1 H. & C. 219, at p. 235.

⁹¹ *Mostyn v. Fabrigas* (1775) 1 Cowp. 161, 176.

⁹² *Scott v. Seymour* (1862) 1 H. & C. 219, *per* Wightman J. at p. 234, mildly supported by Willes J. at p. 236.

⁹³ *The Halley* (1867) L.R. 2 Adm. & Ecc. 3, at p. 7.

able in the circumstances. The *lex loci delicti* as such was irrelevant, except that the *locus delicti* served to exclude British legislation modifying general maritime law. Nevertheless, as a second line of argument, Phillimore J. relied on the *lex loci delicti* in order to introduce Belgian law, which was itself identical with general maritime law.⁹⁴ This process of reasoning was strictly unnecessary and based on little supporting authority.⁹⁵ Instead the phrase occurs "this tort was committed, or this obligation was incurred, in the territory of another state."⁹⁶ Thus a triple assumption, namely, that the act was a tort abroad, that it created an obligation and that all obligations are governed by the conflicts rule dealing with contracts, led to the adoption of the rule that the *lex loci delicti* applies. However, the Privy Council restored the *status quo* by applying the *lex fori* to the claim, which it treated as concerning vicarious liability at common law.⁹⁷ Considerations of liability according to the *lex loci delicti* were disregarded on the ground that British subjects and aliens alike had been allowed for a long time to sue in tort in England in accordance with English law.⁹⁸ It is necessary, however, to note the narrower suggestion made *obiter* that "aliens may sue in England for personal injuries done to them by other aliens, when such injuries are actionable both by the law of England, also by that of the country where they are committed."⁹⁹ Thus the principle that the act must be actionable as a tort in England and in the place where it was committed appears for the first time, but does not form the *ratio decidendi*. Foreign (Belgian) law was taken into account but, to use modern terms, as a *datum* only. It controlled the terms of appointment of the compulsory pilot and the defendant owners' power of control. Their nature determined whether, for the purpose of vicarious liability according to English law, he was a servant of the defendants or not.¹

In 1897 the question, raised above, whether in all circumstances, other than one involving English domiciliaries only, some degree of actionability according to foreign law is required was answered by turning the negative condition formulated in *Phillips v. Eyre* into a positive one.² While the emphasis remained on actionability according to English law, the function of the *lex loci delicti* was re-defined.

⁹⁴ *Ibid.*, at pp. 6, 9.

⁹⁵ *Ibid.*, p. 17 *et seq.*

⁹⁶ *Ibid.*, p. 6. This passage expresses for the first time the *obligatio* theory generally attributed to Mr. Justice Holmes; see *Slaier v. Mexican National Railways*, 194 U.S. 120 (1904); see also *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, at pp. 28-29, *per* Willes J.

⁹⁷ (1868) L.R. 2 P.C. 193, at p. 201.

⁹⁸ *Ibid.*, at pp. 201, 203.

⁹⁹ *Ibid.*, at pp. 202-203.

¹ For the application of this principle, see the cases cited above, p. 95, n. 76.

² *Machado v. Fontes* [1897] 2 Q.B. 231 (C.A.), foreshadowed by the observations of Wightman J. in *Scott v. Seymour* (1862) H. & C. 219, 234 and of Cockburn C.J. in *Phillips v. Eyre* (1869) L.R. 4 Q.B. 225, 239-240.

Unlawfulness according to the latter was required and sufficient, no matter whether the act was a criminal offence or a civil wrong and irrespective of whether it could form the object of civil or criminal proceedings. Until 1968 the only development to be registered ranged over situations where the act fell into an area outside criminality and actionability.³

The judgment of the House of Lords in *Chaplin v. Boys*⁴ has probably removed the rule in *Machado v. Fontes*,² but opinions vary as to what it decided. Although no more than two out of the five members of the House of Lords who heard the case agreed on any one *ratio decidendi*, the following conclusions appear to be justified, bearing in mind that the plaintiff, domiciled in England, succeeded on the strength of English law, the *lex fori*, in an action against a defendant who was also domiciled in England on a claim which was also actionable according to the *lex loci delicti*, Maltese law, but only in respect of a much more limited set of heads of damages.

(1) As a general principle, *Phillips v. Eyre* stands.⁵

(2) It is insufficient if the act constitutes a crime abroad, but not a tort.⁶

(3) In general the act complained of must be actionable both in England and in the *locus delicti*, but the extent of the claim need not be the same in both jurisdictions.

This principle is stated either expressly⁷ or by implication, if it said that the extent of damages both as to heads and quantification are matters of procedure to be determined by the *lex fori*.⁸ It constitutes a “double actionality” rule in the limited sense that the

³ *Walpole v. Canadian Northern Ry.* [1923] A.C. 113, 119; *McMillan v. Canadian Northern Ry.* [1923] A.C. 120.

⁴ [1971] A.C. 356 (H.L.), affirming *Boys v. Chaplin* [1968] 2 Q.B. 1; [1968] 1 All E.R. 283 (Diplock L.J. diss.), dismissing an appeal from Milmo J. [1967] 2 All E.R. 665; and see the comments by North and Webb (1970) 19 I.C.L.Q. 24; Karsten, *ibid.*, p. 35; Pearl [1968] C.L.J. 219; McGregor (1970) 33 M.L.R. 1; Graveson (1969) 85 L.Q.R. 505; Reese (1970) 18 A.J.Comp.L. 189; Webb (1967) 16 I.C.L.Q. 1145.

⁵ Lord Donovan [1971] A.C. 383(D); [1969] 2 All E.R. 1096 end, 1097(A); Lord Pearson [1971] A.C. 398(B), 400(E), 406(D); [1969] 2 All E.R. 1109(E), 1111(F), 1116(E); Lord Wilberforce [1971] A.C. 385(B), 387(B); [1969] 2 All E.R. 1098(F), 1100(B).

⁶ Lord Hodson [1971] A.C. 377(C); [1969] 2 All E.R. 1091(F); Lord Wilberforce [1971] A.C. 388(D); [1969] 2 All E.R. 1101(C); *ca* Lord Donovan [1971] A.C. 383(F); [1969] 2 All E.R. 1097(C); Lord Pearson [1971] A.C. 406(A); [1969] 2 All E.R. 1116(D). No such case is likely to arise in the future since in most legal systems—that of Brazil in 1897 and at present included—a criminal act gives rise to an action in tort either in civil proceedings or by means of *partie civile* proceedings in connection with criminal proceedings. *Cf.* Rabel, *Conflict of Laws* II (2nd ed., 1960), p. 240.

⁷ Lord Guest [1971] A.C. 381(E); [1969] 2 All E.R. 1095(D); Lord Wilberforce [1971] A.C. 389(F); [1969] 2 All E.R. 1102(B); *ca* Lord Donovan [1971] A.C. 383(D); [1969] 2 All E.R. 1097(B); Lord Pearson [1971] A.C. 398(C), 399 (E-F), 405(E); [1969] 2 All E.R. 1109(F), 1110(F), 1115(H).

⁸ Lord Guest [1971] A.C. 381(G), 382(E, F); [1969] 2 All E.R. 1095(F), 1096(D).

act must lead to pecuniary redress abroad in some proceedings, but not necessarily civil proceedings. It does not constitute a "double tort" rule in the sense that the grounds and the heads of damages must be the same as in English law.⁹ The *obiter dictum* in *The Halley*¹⁰ has become a *ratio decidendi*, but not, as originally conceived, restricted to claims between aliens alone.

(4) Alternatively, or possibly by way of a subsidiary rule supplementing the general principle, claims by and against Englishmen (*i.e.*, by parties who are domiciled or, perhaps, ordinarily resident in England) are governed by the *lex fori*, English law.¹¹ Thus the *obiter dicta* in *Scott v. Seymour*¹² assume the character of a *ratio decidendi* in a slightly modified form. Viewed historically, such a rule is supported by the consideration that those who owe allegiance to the Crown owe a duty to observe the Queen's Peace in England, the alleged violation of which formed the basis of trespass. Thus, in historical perspective, the general principle (above 3) applies when one or both parties are domiciled or ordinarily resident outside England. The exception is restricted to parties subject to English law and does not introduce the notion of the proper law of a tort.¹³ Nor does it necessarily require, as a corollary, that actions in tort between two parties who are domiciled or ordinarily resident in the same country abroad should be governed by their personal law, even though two of their Lordships were prepared to consider this proposition.¹⁴ It has been said that in these circumstances, the *lex fori*, English law, is disinterested and that the personal law of the parties, if they belong to the same country, is the only legal system which has an interest in determining the case.¹⁵ This fashionable argument would be persuasive if there existed an overriding division of legislative competence and a corresponding duty of mutual respect, such as the systems developed by the statistists or which the territorialists purported to establish. However, no such system exists, and even if it were

⁹ See for a first consideration of this solution Cussen J. in *Varawa v. Howard Smith* (No. 2) [1910] V.L.R. 509, 529, 533.

¹⁰ (1868) L.R. 2 P.C. 193, at pp. 202-203; Lipstein in *Ius Privatum Gentium* I (1969) 411, at p. 419.

¹¹ Lord Hodson [1971] A.C. 378(E), 379(G); [1969] 2 All E.R. 1092(G), 1093(H); Lord Wilberforce [1971] A.C. 392(C); [1969] 2 All E.R. 1104(F).

¹² (1862) H. & C. 219, 235.

¹³ Lord Hodson [1971] A.C. 377(H); [1969] 2 All E.R. 1092(B); Lord Guest [1971] A.C. 381(C-D); [1969] 2 All E.R. 1095(B); Lord Donovan [1971] A.C. 383(G); [1969] 2 All E.R. 1097(D); Lord Wilberforce [1971] A.C. 391(D); [1969] 2 All E.R. 1102(F); Lord Pearson [1971] A.C. 405(H); [1969] 2 All E.R. 1116(A).

¹⁴ Lord Hodson [1971] A.C. 377(F-G), 380(A); [1969] 2 All E.R. 1092(B), 1094A; Lord Wilberforce [1971] A.C. 392(B); [1969] 2 All E.R. 1104(E). English Private International Law relies on domicile in personal matters, but not all legal systems agree. If the parties to an accident in Italy are German nationals domiciled in Italy, neither German nor Italian law would regard Italian law as preponderantly involved.

¹⁵ Karsten (1970) 19 I.C.L.Q. 35

assumed to exist, no firm criterion can be visualised which determines in what circumstances a legal system has an interest in the particular subject-matter. Such criteria might be sought and found in the nature of the laws, following the attempts of the statutists, or in the territorial connection of persons and objects, not unlike the axiom-like connecting factors in Beale's system. However, all of them would constitute *a priori* principles. If no such overriding system of legislative competence exists,¹⁶ it is well to remember Wächter's observations put forward in reply to the alleged duty to respect foreign acquired rights because the respect for the foreign territorial sovereign demanded it¹⁷: the courts in one country are incapable of determining whether in the view of another country the latter's sovereignty (or, as might be said in the present context, its interests) are affected by a particular factual situation. Even if courts purport to act in deference to any such criteria, they are in fact determining on their own whether to apply foreign law and, if so, which, by imputing an intention to exercise sovereignty or to safeguard an interest. Thus, in the end, the solution is one of policy to be adopted by English Private International Law. This policy has been over the last two centuries to apply English law, but to exclude liability if the *lex loci delicti* authorised, enjoined or ratified the act. The desire to exclude *forum shopping* has now added the double actionability rule, except in the case of parties who are connected by personal ties with England and its jurisdiction. But the overriding position of the *lex fori* in the English conflict of laws has not been undermined or modified nor has the need been shown to introduce the foreign personal law of the parties, if the same for both. In the first place, it may be asked whether the personal law should take precedence over the *lex loci delicti*, if different, especially when it falls to be decided whether an act which is authorised, enjoined or ratified by the latter is to be taken into account. Here the rule in *Phillips v. Eyre* serves the purpose much better. In the second place, it may be asked whether the personal law is to be determined by the residence, the domicile or the nationality or any other personal quality of the parties, such as family ties or implied contractual relationships.

It is equally impossible to rely on another fashionable slogan which decries so-called "false conflicts."¹⁸ In English Private International Law, at least, questions of the conflict of laws arise because the pleadings indicate that each of the parties to the dispute relies on a

¹⁶ It can exist in a federal state governed by a written constitution; cf. Morris, *Conflict of Laws* (1971), pp. 531-532, 533.

¹⁷ (1841) 24 *Archiv für die zivilistische Praxis* 230, at pp. 299, 304; (1842) 25 *ibid.* 150, at p. 162.

¹⁸ Karsten, *loc. cit.*, p. 40; Morris, *Conflict of Laws* (1971), pp. 542-546; and see the observations above.

different legal system to support its claim or defence which is rejected by the other party. Thus a real conflict must exist before the court can exercise a choice of law. And if the view taken here is adopted that, in principle, every legal system is complete unless it curtails its own operation either by allowing foreign law in through its rules of the conflict of laws or in restricting its own scope by spatially conditioned rules, legal systems conflict generally.

(13) *Matrimonial property relations*

In recent years the question has been reopened as to what law determines matrimonial property relations. Previously few doubts existed that the principles now set out in Rules 110 and 111 of the present edition of Dicey and Morris as regards movables and in Rule 80, Exception 2, as regards immovables determined this branch of the law. If there is a marriage contract or settlement, the proper law applies to movables and also to any immovables (if situated in England). In the absence of a marriage contract or settlement movables are governed by the law of the matrimonial domicile, which is that of the husband's domicile at the time of the marriage. Immovables are governed by the *lex situs*. Nevertheless, the last (8th) edition of Dicey's *Conflict of Laws* reflects a recent discussion which was in part solved and in part occasioned by the decision of Roxburgh J. in *Re Egerton's Will Trust*.¹⁹ The matrimonial domicile is not, as had been contended by Cheshire,²⁰ the intended but the actual domicile at the time of the marriage.²¹ But the present wording of Rule 110, which refers to the law of the husband's domicile at the time of the marriage, *in the absence of special circumstances*, lets in the rejected notion in a novel form which may have far-reaching consequences. For it must be remembered, further, that the practice of English courts has not yet settled the question whether, in the absence of a marriage contract or settlement, a change of domicile changes the law governing matrimonial property relations or not, and the present Rule 112 giving effect to such a change subject to the protection of acquired rights is tentative.²²

The recent doubts arise from the fact that while subscribing to the principle that the law of the husband's domicile at the time of the marriage applies in the absence of a marriage contract or settlement, Roxburgh J. was prepared to consider an exception, if it is possible: "to infer that the parties intended their proprietary rights to be

¹⁹ [1956] Ch. 593.

²⁰ *Private International Law* (4th ed., 1952), pp. 492-494; see now 8th ed. (1970) by Cheshire and North, pp. 564-566.

²¹ Subject, possibly, to limited exceptions; see Dicey and Morris, p. 639; *Re Egerton* [1956] Ch. 593, at pp. 604-605.

²² Cf. Westlake, *Private International Law* (7th ed., 1925), p. 73.

regulated by the law of the new domicile from the moment of their marriage.”²³

It has been shown elsewhere²⁴ that when there is *ex hypothesi* no marriage settlement or contract, it is difficult to imply a choice of law, especially where the common law applies. At common law there is either a contract or there is none. In civil law systems the freedom to enter into marriage settlement is, generally speaking, more restricted, but the parties can choose one of several models, and if this choice is not exercised, the adoption of one of these models may be implied by law as an implied contract²⁵ or by operation of law. Thus it may be possible to characterise foreign statutory régimes as contractual, and to imply a choice of law as well. But an implied choice of law alone, without implying a contract in substance as well, is a choice *in vacuo*, where foreign legal systems offer a choice of matrimonial régimes, unless the inference of a choice of law is coupled with an inference of the adoption of a substantive matrimonial régime by the use of a double fiction.

Matters are simpler if only common law systems are in issue. The existence of one single statutory system²⁶ excludes the necessity of a double fiction. It has been argued that, by the use of an implied or constructive choice, the statutory régime of separation of goods must be treated as contractual.²⁷ As a result it is argued that the rule of Private International Law concerning marriage contracts or settlements applies always to the exclusion of that which governs the situation when no marriage contract or settlement has been concluded. This would mean in practice that English Private International Law would be forced into adopting the principle of the immutability of matrimonial property régimes, contrary to the only relevant (though antiquated) authority.²⁸ It may be doubted whether such a development is in accordance with modern aims and trends, which tend to relax the immutability of matrimonial régimes, at least in domestic law.²⁹ Neither the principle of mutability nor that of immutability

²³ [1956] Ch. 593, 605; see also p. 603, last six lines. It is to be noted that Westlake's editor stated in 1925 (at p. 72) that the application of the law of the matrimonial domicile in the sense of the husband's domicile at the time of the marriage may be replaced by that of any domicile "which may have been acquired immediately after the marriage in pursuance of an agreement to that effect made before it." The difference in the wording is to be noted: here an agreement to set up the matrimonial domicile elsewhere, there an agreement to adopt the law of a future domicile.

²⁴ *Clunet* 1961, p. 1152, but see Morris, *Revue critique d.i.p.* 1957, p. 78, at pp. 87-90.

²⁵ e.g., as regards French law, in *De Nicols v. Curlier* [1900] A.C. 21.

²⁶ In England the Married Women's Property Acts 1882-1964.

²⁷ See Goldberg (1970) 19 I.C.L.Q. 557.

²⁸ *Lashley v. Hog* (1804) 4 Paton 581, as analysed and explained by Goldberg, *loc cit.*, pp. 580-584.

²⁹ For the recent reforms in France, see L. Neville Brown (1965) 14 Am.J.Comp.L. 308.

succeeds in eliminating injustices which may arise if spouses move from one country to another. Some can be mitigated by the device of recognising proprietary rights acquired under a previous matrimonial régime.³⁰ Others arise because the conflict of laws splits up certain legal questions for determination by different legal systems (*dépeçage*). Consequently questions of matrimonial property rights may be determined by one legal system and those touching succession by another. As a result, the close gearing of the rules on matrimonial property and on succession in any one legal system is broken, and a surviving spouse may either receive the same as he would have received if one legal system applied alone,³¹ or too much,³² or possibly too little or nothing.

(14) Succession—immovables

If any two interrelated principles have retained their claim to validity throughout the centuries, the rules that succession to movables is governed by the law of the last domicile of the deceased and that to immovables by the *lex situs* qualify for this title. Nevertheless Dr. Morris has recently put forward a powerful plea for the uniform application of the law of the last domicile of the *de cuius* both to movables and immovables and, correspondingly, for the relegation into the realm of history of the hitherto undisputed predominance of the *lex situs*.³³ The examples given by Dr. Morris are impressive. By combining English, Scots and Northern Irish law respectively as the *lex domicilii* and the *lex situs* applicable to the estate of a *de cuius* whose estate consists of movables in one of these countries and immovables in another, leaving him surviving his widow and his mother, he shows that the share of the widow will vary greatly, and that of the mother will fluctuate from a portion to nil. Such a result clearly fails to achieve that harmony of decision which rules of the conflict of laws are supposed to pursue and even offends the sense of justice.³⁴ It should not make any difference in ascertaining the shares attributable to the widow and to the mother whether the deceased died domiciled in England, Scotland or Northern Ireland respectively, if his immovable property is situated in Scotland, Northern Ireland or England or in any combination of these or in any one of these countries alone. One way of achieving uniformity is to determine

³⁰ See Dicey and Morris, Rule 112.

³¹ *Bartholo Case*, C.A. Algiers, 24 December 1889, Clunet 1891, 1171; Robertson, *Characterization in the Conflict of Laws* (1940), p. 158 *et seq.*

³² *Beaudoin v. Trudel* [1937] O.R. 1; [1937] 1 D.L.R. 216.

³³ (1969) 85 L.Q.R. 339.

³⁴ It does not appear to have done so when the same person acquired the movable estate in England and took the Scottish immovables as heir: *Balfour v. Scott* (1795) 6 Bro.P.C. 550, 566.

succession to movables and to immovables uniformly according to the law of the last domicile of the deceased. However, on further analysis, two further features gain prominence. (i) In the first place, the peculiar results demonstrated by Dr. Morris follow from the fact that the statutory rights of a surviving spouse in English, Scottish and Northern Irish law (as distinct from the common law right of *legitim* in Scots law) are expressed in terms of fixed sums of money or of individual homes. This feature is prevalent in common law countries, while civil law systems rely on the technique of reserving a quota for the surviving spouse or a life interest in a portion of the estate. One way of resolving the apparent injustice which follows from the present practice of according the same statutory sum twice over, or of setting off the value of the matrimonial home, if in England, but not in Scotland (if valued under £15,000), would be to make the beneficiary account for any sums received in any one of the other jurisdictions. In practice, this may cause some difficulties, since the final settlement would have to be concentrated in the personal representatives of the deceased, but these may be different persons in the country of the last domicile of the deceased and in that of the *situs*. Within the United Kingdom, general legislation by Parliament at Westminster may overcome this difficulty, but the existing problem will remain troublesome in relation to any other country where the deceased left assets.

(ii) In the second place, the difficulties could be overcome if the statutory rights of a surviving spouse in England, Scotland and Northern Ireland were modified by legislation so as to represent a claim to a portion of the estate (not unlike the *ius relictae* in Scots law). If this position is assessed separately for each estate, as it is at present in order to determine the statutory right, the right of the surviving spouse is geared to the value of the estate. As a result, the existence of separate estates situated in different countries will not lead necessarily to the duplication of the statutory right, but only to its proportional increase. Here again, the intervention of Parliament in Westminster will be necessary, and the present difficulties will remain, where some of the assets are situated in a country outside the United Kingdom.

(iii) As shown above, the solution advocated by Dr. Morris and the measures suggested above have one aspect in common. Any change of existing principles can only be effective if overriding legislation resolves the overlap of statutory rights either (as Dr. Morris wants it) by discarding the *lex situs* altogether in respect of foreign immovables, or (as suggested above (i) and (ii)) by adjusting the nature of the statutory rights in domestic law. Thus any such measures would have to be confined to the United Kingdom. As within the

United Kingdom itself, so in relation to countries outside, the mere fact that the *forum* discards the principle of the *lex situs* in matters of succession to immovables is ineffective, unless the *forum* is also the *situs*. Since the administration at the *situs* can, and normally will, be independent of that at the place of the last domicile of the deceased, it is unlikely to submit of its own to the administration at the latter place. The question is therefore whether countries will be ready to relinquish the *lex situs* rule in respect of successions, the movable assets of which are governed by some other law according to this notion.

Recent experience at the Hague during the preparatory meetings for a Convention concerning the International Administration of the Movable Estate of Deceased Persons has shown that states are not ready to recognise a foreign administration in the place of the last domicile of the deceased unless the rules of Private International Law at the domicile and at the *situs* lead to the application of the same law. They will lead to the application of different laws not only if both countries follow the scission principle, which distinguishes between succession to movables and to immovables, but also if both countries follow the principle of unity of succession, but rely respectively on domicile and nationality as the uniform connecting factor. In order to achieve the result desired by Dr. Morris outside the United Kingdom, it will therefore be necessary to agree not only on the abolition of the rule that succession to immovables is governed by the *lex situs*,³⁵ but also on the adoption of a uniform single connecting factor for the determination of succession to movables. In the present state of the world's systems of Private International Law, such an agreement is unlikely to be forthcoming. It is only possible to contemplate it within the framework of the United Kingdom, and it may be doubted whether an ineffective uniform rule or a two-tier system, which distinguishes between inter-United Kingdom and international rules of Private International Law in matters of succession, will serve a useful purpose. If a change is desirable in order to achieve more equitable results in the conflict of laws, a modification of domestic law on the lines indicated above may lead to the desired improvement. As in the case of matrimonial property relations, the break in the gearing of rules of domestic law by the operation of different rules of the conflict of laws which result in the application of several legal systems to different aspects of the same question cannot be mended by using or refining the techniques of the conflict of laws alone.

³⁵ Outside common law countries, few states rely on this principle; France and Belgium apply the *lex domicilii* to the succession to movables; Austria relies on the *lex patriae*.

HOBBS AND HALE ON LAW, LEGISLATION AND THE SOVEREIGN

D. E. C. YALE

MANY years after launching *Leviathan* and towards the end of his life Thomas Hobbes composed *A Dialogue between a Philosopher and a Student of the Common Laws of England* in which he set out his final thoughts on fundamental matters of law, legislation and sovereignty. This work was published for the first time in 1681, two years after the author's death, and though it represents Hobbes's final thoughts on these questions it has received but slight study compared with his other works. *Leviathan* and other earlier works must, no doubt, take first place in interest for the political scientist. The *Dialogue*, on the other hand, is a work of a jurisprudential slant and is as deserving of the attention of lawyers as it has been largely neglected by them. To this neglect there is one important exception. Sir Matthew Hale rejoined in argument to Hobbes's thesis. His argument remained unpublished till modern times,¹ and even the enormous modern literature on Hobbes's writings has generally preserved a silence upon Hale's *Reflections*. One modern author² indeed remarks briefly that "Hale's short treatise is the most brilliant contemporary reply to Hobbes's theory of positive law," but the remark is not developed. The prevalent opinion may be represented by Holdsworth's view, and this supposes that Hale failed to grasp Hobbes's idea of sovereignty and that Hale's criticism therefore missed its mark.³ It seems timely to re-examine the received opinion (if Holdsworth's may be so called) for more than one reason.

In the first place Holdsworth, in common with other commentators, believed that Hobbes's political doctrines were not fully understood and inculcated till they were taken up and spelled out by Austin and

¹ *Reflections by the Lord Cheife Justice Hale on Mr. Hobbes his Dialogue of the Lawe*. Printed from B.M. Harl. 711, ff. 418-439, by Sir Frederick Pollock in (1921) 37 L.Q.R. 274, and reprinted as Appendix III in Holdsworth's *History of English Law*, V, 499-513. Any future edition of this tract should take account of the drafts in B.M. MS.Harg. 96. Hale died in 1676 and therefore read Hobbes's *Dialogue* in unpublished manuscript form.

² Samuel Mintz, *The Hunting of Leviathan* (1962), p. 49.

³ Holdsworth's discussion is in *H.E.L.*, v, 482-485, and vi, 204-207, 258-262, 294-301, and (biographical of Hale) 574-595. The current assessment of Hale is marked by a note of uncertainty, e.g., G. R. Elton in *Modern Historians on British History* (1970) at pp. 174-175, commenting that Sir Gerald Hurst's article in (1954) 70 L.Q.R. 342 "somewhat depreciates the long over-valued Matthew Hale."

his followers. This belief has since been exploded.⁴ There is now "considerable evidence that Hobbes's central doctrine had been received and ingested, much more fully than is generally recognised, into the mainstream of serious political thinking in his own lifetime."⁵ Secondly, Hobbes's *Dialogue* has recently been reprinted with a modern commentary on the text.⁶ This commentary is introspective upon the text itself. Thus we read much of Sir Edward Coke, because he is conspicuously caught in the cross-fire of the *Dialogue*, but no mention is made of Hale, who alone of contemporary common lawyers attempted a refutation of Hobbes's doctrines. Thirdly, though Hale's position is intelligible from his direct reply to Hobbes's *Dialogue* and from other printed works, the full range of his thoughts on the nature of law and government have remained locked up in unpublished writings, particularly in his writings on Crown prerogative.⁷ These writings give further assistance in understanding Hale's theory of power and legality, what he understood by sovereign power, and where he understood that authority to rest in fact and in law.

How Hale became concerned to combat Hobbes is conjectural. The publication of *Leviathan* in 1651 introduced Hobbes to Selden but there is no evidence that Hobbes entered Selden's circle of scholarship to which Hale and other lawyers, such as Rolle and Vaughan, belonged. But Vaughan, it seems, had read and admired the *Dialogue* and it may be that the text of Hobbes's *Dialogue* passed from the hands of the Chief Justice of one Bench to the Chief Justice of the other and that it was from Vaughan that Hale had the text.⁸ Of more general interest is how Hobbes came to write his

⁴ This reversal of the old view of Hobbes as an isolated thinker was accomplished at one blow by Quentin Skinner's paper "The Ideological Context of Hobbes's Political Thought" (1966) IX *Historical Journal*, 286-317.

⁵ C. B. Macpherson's edition of *Leviathan* (Pelican Classics, 1968), introduction, p. 24. All subsequent references to the text of *Leviathan* are to this edition.

⁶ The text is edited with an introduction by Prof. Joseph Cropsey (University of Chicago, 1971). All subsequent references to the text of the *Dialogue* are to this edition. The editor concludes that Hobbes wrote the work between 1662 and 1675. The earlier terminus is firmly established by internal references to post-Restoration legislation (e.g., the Act of Oblivion and Indemnity). The editor's *terminus ad quem* is based on some elaborate detective work in Hobbesian bibliography. Hale's rejoinder provides additional confirmation, for Hale died on Christmas Day 1676.

⁷ The principal treatise is mentioned briefly in *H.E.L.*, vi, 589: "Preparatory Notes touching the Rights of the Crown." The autograph is Lincoln's Inn MS.Misc. 48. An expanded version of the earlier chapters is a work entitled *Prerogativa Regis* of which the autograph is Lincoln's Inn MS. Harg. 1. There is a complex manuscript background to these works which need not be discussed here except to say that *Prerogativa Regis* represents a third but unfinished rescension of his treatise. These MSS. were written before the Restoration but after 1641. Hereafter I refer to them as *Rights of the Crown* and *Prerogativa Regis* respectively.

⁸ John Aubrey wrote a Life of Hobbes immediately after Hobbes's death. Aubrey had encouraged Hobbes to turn his talents to jurisprudence, lending him a copy of Bacon's *Elements of the Law*. "I desponded that he should make any

Dialogue. "The dry, penetrating but narrow mind of Hobbes"⁹ had established in *Leviathan* a theoretical position which took no heed of history, for there Hobbes was prescribing for peace. That prescription was based on Hobbes's view of man's nature and his explanation of civil society. But his theory was inspired by history, the very recent history of the civil wars, and after the Restoration he turned his eyes back on the past twenty years in *Behemoth: the History of the Causes of the Civil Wars in England*.¹⁰ Later in the *Dialogue* he took an even wider view, and the work can be seen as "a true retrospect on the causes of the great dissolution in English civil society."¹¹ For the most recent editor of this work the thesis is "the paradigm of Bacon's practical politics,"¹² for in the dialogue between the Philosopher and the Lawyer the Philosopher speaks for both Bacon and Hobbes, the Lawyer for Coke, "and Hobbes's controversy with the dead Coke is the continuation of Bacon's."¹³ It may be so; Hobbes had in his youth written to Bacon's dictation, and if Aubrey is to be believed, he had in his old age been again confronted with the thoughts of his old master.¹⁴ But Hobbes in his *Dialogue* was doing more than this. He was relating his final thoughts on the nature of law and power. And Hale's *Reflections* mirror these two aspects of Hobbes's debate, firstly on law as a body of rational rules and secondly on the nature of sovereignty. The two themes are closely connected, and indeed interdependent, though Hale found it convenient to consider them consecutively rather than concurrently.

Hobbes was a pure positivist. For Hobbes "a Law is the Command of him, or them that have the Sovereign Power, given to those that be his or their Subjects, declaring Publickly and plainly what every of them may do and what they must forbear to do."¹⁵ "Statutes," asserts the Philosopher,¹⁶ "are not philosophy as is the Common Law and other disputable Arts, but are Commands or

attempt (tentamen) towards his designe. But afterwards, it seems, in the country, he writt his treatise 'De Legibus' (unprinted) of which Sir J. Vaughan, Ld. Cheife Justice of the Common Pleas, had a transcript, and I doe affirm that he much admired it." This treatise is practically certainly to be identified with the *Dialogue*; Vaughan died in 1674, which brings forward the *terminus ad quem*, above n. 6.

⁹ Plucknett's epithets, *Concise History*, p. 62.

¹⁰ *English Works of Thomas Hobbes*, ed. by Molesworth, VI, p. 161 *et seq.*, hereafter cited as *E.W.* There has been no edition of this work since 1840.

¹¹ *Dialogue*, intro. p. 14.

¹² *Dialogue*, intro. p. 14.

¹³ *Dialogue*, intro. p. 12.

¹⁴ This is not to say that Hobbes was uninfluenced when writing *Leviathan* and other works by the opinions of Bacon. *E.g.*, the second Aphorism in book 8 of *De Augmentis Scientiarum* (Ellis & Spedding, I, 803, V, 88) on the basis of civil society is very much Hobbes's doctrine.

¹⁵ *Dialogue*, p. 71.

¹⁶ *Dialogue*, p. 69.

Prohibitions which ought to be obeyed, because Assented to by Submission made to the Conqueror here in *England*, and to whosoever had the Sovereign Power in other Commonwealths; so that the Positive Laws of all Places are Statutes."

The test of what is law is therefore the expression of legislative will, not wisdom, not reason, either in law-givers or in their laws,¹⁷ and the Philosopher, when he sat down to read the laws, did so not to reason upon them but to know them that he might better obey them. Hobbes could not admit reasonableness as a criterion, for if men being endowed with the faculty of reason might question the validity of laws on grounds of unreasonableness, how could there be habitual obedience? The authority of a command could not, for Hobbes, depend on whether it was reasonable, nor could the justice of a law depend on its being reasonable. And this last proposition was central to Hobbes's idea of law as sovereign command, for sovereign command was necessarily just. It would have been therefore a self-contradiction for Hobbes to have defined law as depending on having the quality of being reasonable. Here was the issue which brought him into direct conflict with Coke's definition of law as "perfect reason, which commands those things which are proper and necessary and which prohibit contrary things,"¹⁸ and with Coke's idea of law as the product of reason.

In the *Dialogue* Coke's theory of artificial reason is indeed fairly set out by the Lawyer. The Philosopher replies¹⁹ that he cannot conceive that "the Reason which is the Life of the Law, should not be Natural, but Artificial," for however much special knowledge and skill may be required to understand the common law, still reason itself is a human faculty and not the exclusive property of a profession. "But I suppose that he [Coke] means, that the Reason of a Judge, or of all the Judges together (without the King) is that *Summa Ratio*, and the very Law, which I deny, because none can make a Law but he that hath the Legislative Power."

Hobbes was concerned to combat Coke's theory of legal reasoning as the animating spirit of law. Where Coke wrote,²⁰ "Reason is the

¹⁷ The antithesis is of course as old as discussion about the nature of law. In 1345 it was argued that judges should do as other judges, otherwise the law could not be known. Hilary J.: "Law is the Will of the Justices." Stonor J.: "No, Law is that which is right." Y.B. 18 and 19 Edw. III, R.S. 376. Maitland commented in a letter to Leslie Stephen, "I rather fancy that Hobbes's political feat consisted in giving a new twist to some well-worn theories of the juristic order and then inventing a psychology which would justify that twist": *Letters* (ed. Fifoot), no. 303, p. 304.

¹⁸ Co.Litt. 319b, where it appears characteristically dressed up as a Latin maxim and in annotation to a highly technical passage about the difference in applying the rule in *Shelley's Case* to freehold and leasehold limitations of gift.

¹⁹ *Dialogue*, p. 55.

²⁰ Co.Litt. 97b. See also Co.Litt. 232b.

life of the law, nay, the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and of experience, and not of every man's natural reason. . . . This legal reason *est summa ratio*," to this Hobbes replied that such statements were partly obscure and partly untrue. The untruth lay in the failure to conform to Hobbes's own idea of law; he was bound to deny the statement as being inconsistent with his idea of sovereign power, but the obscurity lay in a failure not of agreement but of understanding. Coke's idea of law was not essentially that of a judge-made law, as Hobbes seems to have thought, but of law as the product of intellectual reason, not of an authoritative will. Till recently this idea has received little scrutiny, though its phrases have often been used as incantations, but a recent study²¹ suggests two ways in which Coke's theory differed from that of others who had held that law was a product of reason rather than will.

When someone such as Aquinas, for example, says that law is the work of reason he does so because he thinks that the primary function of law is to guide or direct men to act in ways necessary for attaining or preserving the "common good" and that what those ways are can be determined only by the lawmaker's reasoned judgments, not by mere fiat. For Coke, on the other hand, law is a work of reason in this sense, that it is the nature of law to be reasonable; and the test of its reasonableness, he thinks, is its ability to withstand the test of time.

Moreover, in Coke's thinking, men should obey the law not because it is socially desirable that they should, but because of its reasonableness, and again the reasonableness of a law is attested by its endurance in terms of time.

It would be easy to see here a mere love of antiquity irrespective of utility, but it would be wrong so to do as well as being unjust to Coke. The type of law for Coke was the common law seen not as case-law but as customary law. This customary law had superseded the various local customs of the land and those local customs which remained were themselves allowed only on condition of reasonableness,²² even if they were not in correspondence with the common custom of the realm, as for example, gavelkind contrasted with primogeniture. But in Coke's theory the common custom of the realm was totally reasonable, in the sense that it represented the product of a professional skill working a refinement and co-ordination of

²¹ J. U. Lewis, "Sir Edward Coke: his Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory" (1968) 84 L.Q.R. 330 at p. 339.

²² "Every custom supposes a law, and if it be not irrational, and entertains no contradictions, it is good," *per* Vaughan C.J., *Collsherd v. Jackson* (1672) Freem.K.B. 63 at p. 64. And Littleton (s. 80), writing of manorial customs, applies the same test: "et tout ce que n'est pas encounter reason poit bien estre admitte et allow."

social habits into a system of rules. Coke did not claim that the common law was perfect, only that it was the perfection of this reason, a product of a reasoning process. Coke, however, never explained his doctrine in a consecutive way: it is to be gathered from scattered passages in his writings and reported judgments.²³ In the face of Hobbes's refutation it was left to Hale to restate the theory and to give it a new direction.

Hale adhered to Coke's position, which was indeed the classical common law theory, that the laws were "the Production of long and iterated Experience,"²⁴ that sufficient knowledge of the laws was not acquirable by "the bare Exercise of the Faculty of Reason" and that complete knowledge was obtainable only by reading, study and observation. Nevertheless Hale was obliged to consider what reasonableness signified. By the beginning of the seventeenth century "there was no longer universal agreement on what was 'reasonable.' Rationality is a social conception, and social divisions in England (and elsewhere) were producing conceptions of what was 'rational' which were so different that in the last resort only force could decide between them."²⁵ And amid the welter of precedents and the variety of interpretations produced in the constitutional conflict, "the question that mattered, as Hobbes saw, was Who is to interpret?"²⁶

Hale certainly agreed with Hobbes that the law could not be left to interpretation by individual reason. Law was a moral science, and therefore in regulating civil society and in measuring right and wrong "it is not possible for men to come to the same certainty, evidence and demonstration . . . as may be expected in Mathematicall Sciences."²⁷ The best that can be achieved is a set of rules which, given the complexities of life, produce satisfactory results in the largest possible number of cases. Hale certainly did not believe in a "sovereign" remedy for all ills, taking, as he was fond of doing, a biological analogy that because "the texture of Humane affaires is not unlike the Texture of a diseased bodey labouring under Maladies, it may be of so various natures that such Phisique as may be proper for the Cure of one of the maladies may be destructive in relation to the other, and the Cure of one disease may be the death of the patient."²⁸ Laws should therefore be based on as large a variety

²³ C. Hill, *Intellectual Origins of the English Revolution*, pp. 250-254, gathers together many of Coke's pronouncements in convenient summary.

²⁴ *Reflections*, p. 505.

²⁵ Hill, *op. cit.*, p. 254.

²⁶ Hill, *op. cit.*, p. 254.

²⁷ *Reflections*, p. 502. For an extended discussion of Hale's method of analysis and particularly his theory of knowledge in the context of contemporary scientific thought, see Barbara J. Shapiro, "Law and Science in Seventeenth-Century England" (1969) 21 *Stanford L.R.* 727.

²⁸ *Reflections*, p. 503.

of experience as possible. Obviously the experience of many is more valuable than the experience of few, and it follows that, given reason is founded in experience, the reason of many is more reliable than the reason of one man or of few. Such extended experience may be best found on the plane of time, that is, in history. Hale was then to Hobbes what Burke later was to Bentham.²⁹ Abstract or *a priori* reasoning is repudiated. "Hale follows Selden in implying that the lawyer's knowledge is historical knowledge: in knowing the judgments and statutes of the past, he knows what ills they were designed to remedy and what the state of the law was which they remedied. In this way his understanding of the law's content is deepened, and he comes to see a greater part—never, perhaps, the whole—of the accumulated wisdom with which the refining generations have loaded it."³⁰

Where Hale differed from Coke was in the possession of a truly historical sense. Custom was based on immemorial usage,³¹ but that meant for Hale little more than the fact that it was not possible to discern the inception of most rules of customary origin and that usage time out of mind was the way social custom passed into common law. It did not mean for him that those rules had preserved an unchanging content and that the law had existed in its present form from the beginning of time,³² or a legal world without beginning.

Coke had believed with Fortescue that the common law was aboriginal, at least as old as the ancient Britons and the Druids.³³ For Coke "the grounds of our common laws at this day were beyond the memory or register of any beginning, and the same which the Norman conqueror then found within this realm of England."³⁴

²⁹ With the caveat that Bentham did not subscribe to Hobbesian doctrines of sovereignty but accepted the possibility of limited or divided sovereignty on grounds of a limited disposition to obey. See H. L. A. Hart, "Bentham on Sovereignty" (1967) *Irish Jurist*, Vol. 2 (N.S.) p. 327, and his comments at pp. 334-335 on the faulty correlation.

³⁰ J. G. A. Pocock, *The Ancient Constitution and the Feudal Law*, p. 173.

³¹ What was the required proof of immemorial usage was worked out in medieval public law principally through franchises (see D. W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I*, Chap. IV) and in medieval private law through copyhold (see C. M. Gray, *Copyhold, Equity and Common Law*, pp. 199-201). There was a conflict between the idea of immemoriality as depending on living memory, *i.e.*, the local jury, or on a rule of law, a "legal" memory back to 1189.

³² The inability to point to temporal acts of creation led some lawyers to ascribe even earlier origins to the common law. "Comen ley ad estre puis le creacion del monde," says a yearbook lawyer in 1470. Y.B.Pasch. 10 Edw. 4, SS. vol. 47, p. 38. And this was no verbal flourish in argument, for Fortescue in the same age could write (*De Laudibus*, Chap. XVII) that English law was the best in the world because it was the most ancient, older than the laws of Rome and Venice.

³³ Thus in his introduction to 2 Rep. pp. vii-viii he echoes Fortescue and writes, "If the ancient laws of this noble island had not excelled all others it could not be but some of the several conquerors and governors thereof, that is to say, the Romans, Saxons, Danes or Normans, and specially the Romans . . . would have altered or changed the same." In the introduction to 6 Rep. he reiterates and elaborates on this.

³⁴ 8 Rep., intro., p. iv.

Coke did not deny the fact of change but he seems to have thought of change in the law as being inherently of an aberrant quality, and his theory attributed to the common law an inherent tendency to return to the first state of a legal rule. While it is true, writes Coke,³⁵ "some time by acts of parliament, and some time by invention and wit of man, some points of the ancient common law have been altered or diverted from its due course, yet in the revolution of time the same [points of law] (as a most skilful and faithful supporter of the Commonwealth) have been with great applause, for avoiding of many inconveniences, restored again." All this was part of Coke's work in creating a theory of the constitution. "His tremendous labours achieved what Camden, Stow, Speed, and Raleigh had failed to do: they gave Englishmen an historical myth of the English constitution parallel to Foxe's myth of English religion."³⁶ The English had had ideal laws before the Conquest and since the cataclysm the political struggle had been to recover them as safeguarding the subjects' liberty against the king's power.

Hale, on the other hand, felt no need to ascribe this perpetual and unbeginning character to the common law. The purpose of laws was to further and protect social needs, and the nature of laws "being to be accommodated to the conditions, exigencies and conveniences of the people, for or by whom they are appointed, as those exigencies and conveniences do insensibly grow upon the people, so many times there grows insensibly a variation of laws, especially in a long tract of time; and hence it is, that though for the purpose of some particular part of the common law of *England*, we may easily say, that the common law, as it is now taken, is otherwise than it was in that particular part or point in the time of Henry II when Glanville wrote, or than it was in the time of Henry III when Bracton wrote, yet it is not possible to assign the certain time when the change began. . . ."³⁷ And Hale did not hypothesise an original body of law, but saw instead a series of accretions. In his view,

it is almost an impossible piece of chymistry to reduce every *Caput Legis* to its true original, as to say, this is a piece of the Danish, this of the Norman, or this of the Saxon or British law; neither was it, or indeed is it much material, which of these is their original; for 'tis very plain, the strength and obligation, and the formal nature of a law, is not upon account that the Danes, or the Saxons, or the Normans, brought it in with them, but they

³⁵ 3 Rep., intro., p. xxxiii.

³⁶ Hill, *op. cit.*, p. 257.

³⁷ Hale, *The History of the Common Law of England* (4th ed.), p. 60. A reprint of the third edition has recently appeared (Univ. of Chicago, 1971) with an Introduction by C. M. Gray, which discusses Hale's legal and historical thought, especially p. xxxii *et seq.* in relation to Hobbes's views. This discussion has come to my attention too late to permit more than this reference.

became laws, and binding in this kingdom, by virtue only of their being received and approved here.³⁸

The absence or paucity of evidence, Hale argued, may prevent us from learning when and how a particular custom arose, but we need not doubt that some customs are older than others, and all have a beginning as custom is imperceptibly formed. Hale's view of the common law therefore involved him in the idea of historical flux and change. Custom is as creative of law as much as legislative command or judicial interpretation, and though it may be an insensible process compared with the conscious activity of legislator or judge, it is as law-making as the others, and its creative force was continuous.

Though the sources of the common law might be in Hale's words "as undiscoverable as the head of the Nile,"³⁹ the common law was in effect common and general custom⁴⁰ as contrasted with local and particular custom. Here he spoke the traditional language of common lawyers in considering the force and effect of local customs.⁴¹

First, the common law does determine what of those customs are good and reasonable, and what are unreasonable and void. Secondly, the common law gives to these customs, that it adjudges reasonable, the force and efficacy of their obligation. Thirdly, the common law determines what is the continuance of time that is sufficient to make such a custom. Fourthly, the common law does interpret and authoritatively decide the exposition, limits and extensions of such customs.

This common law, though the usage, practice and decisions of the king's courts of justice may expound and evidence it, and be of great use to illustrate and explain it, yet it cannot be authoritatively altered or changed but by act of parliament.

This last remark has a modern ring but it may be doubted whether Hale intended to remit all reform of the common law to parliament and to absolve the common law from the need to adjust and amend through its own processes. Elsewhere in considering especially the means and modes of law reform⁴² he was of the opinion that "what

³⁸ Hale, *op. cit.*, p. 64.

³⁹ Hale, *History of the Common Law*, p. 59. The figure is taken from Davies' report of *The Case of Tanistry* (1608) at p. 32, where it is said that "le commencement del custome (car chescun custome ad un commencement coment que le memorie del home ne extend a ceo; come le river Nilus ad un fountaine, coment que les geographers ne poent trover ceo) doet estre reasonable ground & cause."

⁴⁰ Hale, *History of the Common Law*, p. 68, links together "the common law and custom of the realm" as "the great substratum." He also thought that some parts of the common law might have originated in legislation now lost and forgotten, but he would not have agreed with the extravagant thesis of Wilmot C.J. (*Collin v. Blantern* (1767) 2 Wilson K.B. at p. 348) that "the common law is nothing else but statutes worn out by time; all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing. . . ."

⁴¹ Hale, *History of the Common Law*, p. 25.

⁴² *Considerations touching the Amendment or Alteration of Lawes*, cap. iv. Hargrave's Law Tracts 249 at p. 272.

can be done by the power and authority of the court and judges, without troubling a parliament for such things . . . would go a very great way in the reformation of things amiss in the law," adding that "sometimes it falls out that an unnecessary application to parliament in things that are otherwise curable breeds unexpected inconveniences." Nevertheless Hale undoubtedly considered that the principal vehicle for reform should be legislation,⁴³ but considering the history of the common law he saw a process of perpetual change, both growth and decay. In addressing students of the common law he put it in this way:⁴⁴

If any Man shall object that if there be that Excellency in the English lawes, What is the reason there have been many changes therein in succession of Times? I Answer in General, that it cannot be supposed that Humane lawes can be wholly exempt from the common fate of Humane things which must needs be subject to particular defects and mutabilities, time and experience, as it hath given it the perfection it hath, so it must and will advance and improve it. But more particularly, the mutations that have been in this kind, hath not been so much in the law, as in the subject matter of it⁴⁵; the great wisdom of Parliaments have taken off, or abridged many of the Titles about which it was conversant: Usage and disusage hath antiquated others, and the various accesses and alterations in point of Commerce and dealing, hath rendered some proceedings, that were anciently lesse in use, to be now more useful; and some that were anciently useful to be now less useful,

and he then discusses "several great Titles in the law which . . . are at this day in a great measure antiquated, and some that are much abridged and reduced with a very narrow compass and use."

We need not follow Hale into the details descriptive of such changes. He has been credited with advancing a properly historical theory of legal development and in particular advancing beyond the theory held by Coke. Hale's "vision of a historical flux seems as far from the thought of Coke as could very well be. Hale seems to have escaped the pitfalls which trapped his great predecessor into treating custom as immemorial and immutable; all his emphasis is placed not on antiquity but on process and continuity."⁴⁶ Yet Hale's

⁴³ For Hale's activities as law reformer, see Mary Cotterell, "Interregnum Law Reform: the Hale Commission of 1652" (1968) *Eng. Hist. Rev.*, Vol. lxxxiii, 689. For Hale's reasons for the failure of the reform movement, *Considerations*, *supra*, n. 42, at pp. 274-275, and more generally Donald Veall, *The Popular Movement for Law Reform 1640-1660*, pp. 228-235.

⁴⁴ Rolle's *Abridgment* (1668), introduction pp. iii-iv.

⁴⁵ A dark saying but relatable to this passage in his tract on law reform (*supra*, n. 42) at p. 258, writing of "such alterations, as do not so much constitute a new law, as amend the old; so that it still morally continues the same law, notwithstanding these appendications, as the Argonauts' ship was the same ship at the end of their voyage as it was at the beginning, though there remained little of the old materials but the chine and ribs of it."

⁴⁶ Pocock, *op. cit.*, p. 178.

view was not as original as select but representative quotations from Fortescue and Coke might suggest, for custom in the tradition of common law both made and unmade rules of law. The source of most seventeenth-century professional thinking on this question returned to the treatment of custom as discussed and reported in Sir John Davies' reports,⁴⁷ and Hale borrowed heavily from this source. Davies, in his introduction, writes that "a *custome* doth never become a *law* to bind the people untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a law."⁴⁸ And in writing of custom Davies had in mind principally the *Case of Tanistry*⁴⁹ which he himself had argued in Ireland and which was perhaps the most ample opportunity afforded to the judges of the seventeenth century to consider the place of local custom in the general law.

In this case the Irish court of King's Bench had to decide whether the custom known as tanistry was a part of Irish law. The custom (which was certainly part of the indigenous law of Ireland) provided for descent of land upon the eldest and worthiest male relative of the blood and name of the deceased and excluded females from the inheritance. The judges decided to reject the custom. It was found unreasonable and so void *ab initio*. We need not pause upon the absurder aspects of this opinion, *e.g.*, the invalidity of ancient Celtic custom because it permitted abeyance of seisin. The principal reason adduced was the objection of "usurpation," that the custom was objectionable because it encouraged the use of force and oppression.⁵⁰ The whole argument is riddled with artificiality when the initial validity of the custom is under discussion, but it is another case when the argument turns on whether such a custom could survive the introduction of English law into Ireland. Here the court was faced with the effect of conquest on the native laws and customs of Ireland.

⁴⁷ Published in 1615. A selection of Irish cases litigated while the reporter was Attorney-General there.

⁴⁸ It is for this reason that Davies thought customary law better than legislative acts "which are imposed upon the subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no."

⁴⁹ (1608) Davies 28. A clear summary of the case is given by F. H. Newark in (1952) 9 *Northern Ireland Legal Quarterly* 215.

⁵⁰ Davies 34: "Car le antient Breton ley fuit que tiel terre irroit al plus eigne del sept que fuit le veray tanist & appel en Latine secundus, esteant successor apparant mes pur ceo que le plus eigne ne fuit tous foits le plus active, ou ne avoit le greinder number des followers, un auter plus powerfull person per faction & fort main intrudoit sur le plus eigne, & procuroit luy mesme destre elect, come esteant plus digne." The testing of custom by reference to oppression by the stronger of the weaker was of course familiar to English lawyers in the context of manorial custom. The cases from the Y.B.B. onwards are set out in C. K. Allen, *Law in the Making*, 7th ed. (1964), Appendix at pp. 614-632.

After the most elaborate review of records the lawyers of 1608 decided that conquest carried in the laws of England to the supersession of the common custom of Ireland. In reaching this desired conclusion it was necessary to explain why tanistry should be treated differently from other customary laws of descent. The answer provided was⁵¹: "auxy cest custome ne poit estre resemble al custome de gavelkind en Kent que avoir continuance apres le Norman Conquest⁵²; car le common ley Dengleterre ne fuit introduce per le Conqueror, come ad estre observe and prove tresdoctment per le Seignior Coke in le Preface al Tierce Part de ses Reports." Here was the difference. Gavelkind was said to be allowable because it was said to be pre-existent to the Conquest of 1066 and according to the received opinion the Conqueror succeeded to the old monarchy and preserved the old laws, but by contrast the conquest of Ireland was a triumph of one legal order over another. Tanistry whether general or local custom "esteant repugnant a les rules del common ley serroit abolish per le introduction and establishment del common law en cest realm."⁵³ According to this view of the past the conquest of England was, juridically considered, a very different matter from the conquest of Ireland⁵⁴; in England the common law had priority before the conquest, in Ireland its imposition was the result of conquest and subjugation of the people.

All this was no more than the legal commonplace of the time. Not only the common law, but Parliament,⁵⁵ together with much else,

⁵¹ Davies, 40.

⁵² This treatment of gavelkind was not a novelty in the common law tradition, e.g., in Y.B. (Mich.) 14 Hen. 4 f. 2, pl. 6, at f. 7a, *per* Hankford J. with regard to unity of possession where the lord acquires the tenant's gavelkind land by purchase or escheat. This and other customs, he said, belonged to places where William the Conqueror had confirmed their ancient customs and laws, and therefore they must be allowed as valid.

⁵³ Davies 40.

⁵⁴ But the two events had this similarity, from the view point of 1608, they neither of them effected *per se* confiscation of land by the conqueror. Queen Elizabeth was not in possession of these Irish lands by virtue of the first conquest, nor was William of English lands. "Car revera le Norman Conquerour, coment que il fesoit plus absolute a entire Conquest Dengleterre que Henr. 2 fesoit de Ireland, uncore il ne seisist tout, ne avoit le actual possession de tous des terres deins le realme Dengleterre vest en luy per le Conquest. . . ." True, Bodin and Choppinus had asserted otherwise, "mes nostre record de domesday est, en cest point, de melieur credit que tous les forrein discourses ou chronicles de mounde." Davies 41. The matter had not gone undiscussed in the fifteenth century. E.g., on a Reading on Merton, c. 4 (Sel.Soc. vol. 71, p. civ): "Sur cest estatut fuit move que quant William Conquerour ust conquerre cell terre per le conquest tout la terre fuit en son mayn donquez apres il done a sez homez queux fueront ove luy en son viage divers maners ove certain seigniores. . . ."

⁵⁵ Coke's explanation in the introduction to 9 Rep. is an excellent example of his method. He argues that as the Saxon monarchs held deliberative assemblies, so they must have included representatives of the commons. Why? Because Domesday shows there were tenants in ancient demesne of the Crown before the Conquest. The earliest information we have shows that they were exempt

preceded the cataclysm of conquest. To the question why the earlier common law should not have suffered abrogation by conquest in England (as the Irish "common law" did in Ireland) the answer was constant. The conquest in England was not a conquest over the people, conferring an absolute title on the conqueror. To have admitted that would have been

to admit an indelible stain of sovereignty upon the English constitution. A conquest was therefore not admitted in the eye of Blackstone any more than in the eye of Coke. William was no conqueror, said the lawyers and antiquaries and the parliamentarians in chorus; he was a claimant to the crown under ancient law who vindicated his claim by trial of battle with Harold, a victory which brought him no title whatever to change the laws of England.⁵⁶

Hale on this matter followed the general opinion and he spent much time in arguing the point.⁵⁷ Maitland⁵⁸ and Holdsworth⁵⁹ both regretted this. And the latest commentator on Hale's historical method believes too that here Hale's sense of historical change abandoned him; there was an inability to see the significance of the Conquest historically in terms of its own time and age and "he was not able to persuade himself that a right won by the sword did not descend untouched through the centuries; conquest remained an absolute which the history of England as he saw it could not absorb."⁶⁰ And these criticisms are true enough if Hale is to be understood as writing of historical facts alone, but they seem to miss the point that this was a discussion about contemporary constitutional law. None of the protagonists was much interested in the Conquest as a historical event, they were interested in it as an episode of the past which had to be interpreted as the basis of a constitutional theory. This may be called "myth-making" but every age creates in this way. Hale and his contemporaries debated the significance of the Conquest of 1066 in much the same manner as later generations discussed the significance of the Revolution of 1688.

Hobbes was not afraid of the Norman Conquest; it suited his

from the parliamentary duties imposed on other freeholders, "therefore there were Parliaments unto which the Knights and Burgesses were summoned both before and in the reign of the Conqueror."

⁵⁶ Pocock, *op. cit.*, p. 53.

⁵⁷ The principal printed source is the earlier part of his *History of the Common Law*. The argument is also fully set out in Chap. II of the *Prerogativa Regis*.

⁵⁸ *Coll. Papers*, vol. 2, p. 5: "Unfortunately he was induced to spend his strength upon problems which in his day could not permanently be solved, such as the relation of English to Norman law, and the vexed question of the Scottish homage. . . ."

⁵⁹ *H.E.L.*, vi, 586 "a purely academic discussion—the question in what sense, if at all, William I could be said to be a conqueror."

⁶⁰ Pocock, *op. cit.*, p. 180.

book and he derived sovereignty from it.⁶¹ As to that idea Hobbes's doctrine was the psychological offspring of his dismay at civil discord, and it was his prescription for domestic peace. Hobbes's figure or model of commonwealth emerged from the anarchy of men in the aboriginal state of nature. Men combined to form a commonwealth and by their submission conferred power on a sovereign. This determinate sovereign, whether man or assembly of men, was a necessary part, the essence of Hobbes's scheme of commonwealth. The sovereign ruled by power and once submission had initially conferred that power there could be no ensuing contract between sovereign and subject. In this theory of extreme concentration of power, the sovereign power was strictly indivisible, and unlimited, and though transferable, irrevocable. It followed for Hobbes that the sovereign's commands or laws must be absolutely binding,⁶² and must be accounted necessarily just. The sovereign's laws might be iniquitous or detrimental to the welfare of the commonwealth, but unjust they could not be. In the *Dialogue*⁶³ Hobbes has the Lawyer agree with the Philosopher on this point, that a just action is that which is not against the law, and therefore, says the Philosopher, "it is manifest that before there was a law, there could be no injustice, and therefore laws are in their nature antecedent to justice and injustice, and you cannot deny but there must be law-makers before there were any laws, and consequently before there was any justice..." Hobbes's sovereign was then a power above the law and his laws were anterior to and defined the idea of justice. Sovereignty was a fact, the basic fact of political power. This was *summa potestas* and its possessor was *legibus solutus*.

This indeed was the reason why Hobbes was then and later so widely disliked and distrusted as a teacher of politics. The loss of power and of the ability to protect discharged civil obligation⁶⁴ and indeed legitimised successful revolution. Despite Hobbes's monarchical prejudices, his theory is perfectly plain, and the final page of *Behemoth*⁶⁵ sufficiently surveys the historical scene in the light of this theory.

⁶¹ *Supra*, n. 16. *Dialogue*, p. 160, also draws the conclusion of complete confiscation of land by the Conqueror, in contrast with the inference of the theory of the common lawyers, *supra*, n. 54.

⁶² The one qualification Hobbes allowed was that the need for self-preservation could justify resistance to the sovereign. ⁶³ p. 72.

⁶⁴ As Clarendon pointed out Hobbes's doctrine allowed the sovereign's subjects to abandon him at the very time he needed their assistance. *A Brief View and Survey of . . . Leviathan* (1676) p. 90.

⁶⁵ *E.W.* VI, 418. In *Leviathan* (p. 375) the limits of obligation are clearly expressed. The subject while protected by his sovereign "is obliged, without fraudulent pretence of having submitted himself out of fear, to protect his protector so long as he is able," but when "there is no further protection of subjects in their loyalty, then is the commonwealth DISSOLVED, and every man at liberty to protect himself by such courses as his own discretion shall suggest unto him."

I have seen in this revolution a circular motion of the sovereign power through two usurpers, from the late King to this his son. For . . . it moved from King Charles I to the Long Parliament; from thence to the Rump; from the Rump to Oliver Cromwell; and then back again from Richard Cromwell to the Rump; thence to the Long Parliament; and thence to King Charles II, where long may it remain.

It appears something of a paradox that a power designed to prevent civil discord should prove so peripatetic and the sovereign so perishable, but Hobbes would have denied an incongruity. In his scheme authority was a result of political power and effective power was self-legitimizing. But before pursuing this question of *de facto* power as raising constitutional authority, it is necessary to consider further the notions of sovereignty as conceived by Hobbes and controverted by Hale.

Though Hobbes's theory has never squared easily with the facts of federal constitutions, it has been made to square more comfortably with the British Constitution by the axiomatic proposition that the King in Parliament is omnipotent as far as physical control extends and is legally without limit.⁶⁶ The more recent questions raised by modern jurisprudential writings are concerned with matters of recognition, and it has been claimed that before the sovereign can be identified as such and before his acts can be recognised as his authoritative commands, it must be a body of law which supplies the rules enabling such identification and recognition. It follows that it is still ultimately for the judges to say what the sovereign is and what are or are not his or its acts. The success of these attempts to harness *Leviathan* of course depends on how the idea of sovereignty is conceived in the first place, how far and in what way the title or authority can be derived from the fact of power.⁶⁷

⁶⁶ As Hart (*Concept of Law*, p. 65) points out with regard to the theory of illimitability "the legally unlimited power of the sovereign is his by definition: the theory simply asserts that there could only be legal limits on legislative power if the legislator were under the orders of another legislator whom he habitually obeyed; and in that case he would no longer be sovereign." The theory therefore is not that there are no limits, 'only that there are no legal limits on sovereign power. The author concludes his chapter on Sovereignty with the opinion "there is no absurdity in the notion of a hereditary monarch . . . enjoying limited legislative powers which are both limited and supreme within the system." This is a very exact way of summarising the common law theory as held by Hale and discussed below.

⁶⁷ It may be argued, as does H. W. R. Wade in "The Basis of Legal Sovereignty" [1955] C.L.J. 172, that obedience to a sovereign is ultimately a political fact and that the political reality imposes the constitutional relationship between Parliament and the courts, but against that it has urged that "it is indeed difficult to maintain the position that the existence of a sovereign authority does not involve the statement of a rule but only a statement about the behaviour

Hobbes's theoretical figure of the sovereign is the sum of its necessary attributes and no more, but the more practical question is where in terms of historical interpretation and location did Hobbes place English sovereignty? It is usually supposed that in the chapter⁶⁸ on Civil Laws in *Leviathan* Hobbes affirmed the sovereignty of *Rex in parlamento*.⁶⁹ Among "some foolish opinions of lawyers" which Hobbes was there concerned to refute was "*That the Common Law hath no Controller but the Parliament*"; which assertion is true, says Hobbes,⁷⁰

only where a Parliament has the Sovereign Power, and cannot be assembled, nor dissolved, but by their own discretion. For if there be a right in any else to dissolve them, there is a right also to controule them, and consequently to controule their controulings. And if there be no such right, then the Controuler of Lawes is not *Parlamentum*, but *Rex in Parlamento*. And where a Parliament is Sovereign, if it should assemble never so many, or so wise men, from the Countries subject to them, for whatsoever cause; yet there is no man will believe, that such an Assembly hath thereby acquired to themselves a Legislative Power.⁷¹

This important passage seems textually amiss. We may suppose Hobbes to have meant this. The right to summon and dismiss belongs to the king, so he is "controuler" and sovereign, since the parliamentary assembly exists at his pleasure. The sovereign is therefore *Rex* and, Hobbes adds, *in Parlamento*.⁷² But this presents a further difficulty because the king clearly exists both before and after Parliament and when Parliament dissolves, the king lives on. Sovereignty cannot be viewed as an intermittent phenomenon of political fact as if it were a clock which periodically is put in motion after running down or a sun-dial which works only when the sun is up and out. This difficulty⁷³ can only be resolved by saying that

of courts," Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, pp. 43-46, discussing Professor Wade's argument. See further, for more recent comment by Mr. Marshall, *Constitutional Theory* (1971), Chap. 3, "Legislative Power and Sovereignty," pp. 35 *et seq.*

⁶⁸ Part II, Chap. xxvi, pp. 315-316.

⁶⁹ Oakeshott in his introduction of the Blackwell edition of *Leviathan* (1946), p. xxxix, n. 3: "Hobbes dismisses all mixed forms of sovereign authority, but he considered the sovereign in England was *Rex in parlamento*."

⁷⁰ p. 316.

⁷¹ This last sentence poses very great difficulties because Hobbes seems to be saying that a kingless Parliament cannot acquire a legislative power even if sovereign. The sense can be made to square with Hobbes's definition of sovereignty by amending the opening words "And where a Parliament is [not] Sovereign . . ."

⁷² The sense is achieved in this line by deleting a negative in the penultimate sentence, "And if there be such right, then the Controuler . . . is not *Parlamentum* but *Rex* . . ." The textual amendments in this and the previous note are not warranted by any edition of the text. Hobbes may have written the words as printed; if so, they must be accounted slips of the pen.

⁷³ Maitland was very conscious of this difficulty and in his *Constitutional History*, p. 298, writing of the seventeenth century, enjoins us to "consider how very

the king is sovereign but that he possesses legislative power only in company with his Parliament or in Parliament, but such a statement cannot properly lie in Hobbes's mouth because it asserts a limitation upon the power of the sovereign. It was this difficulty which probably induced the incoherence in the particular passage of *Leviathan*. In the *Dialogue*, on the other hand, Hobbes speaks more surely and logically. Here the king is "sole legislator"⁷⁴; he is legislator "both of statute-law and of common law," and the Philosopher remarks that

yet not all Kings and States make Laws by Consent of the Lords and Commons; but our King here is so far bound to their Assents, as he shall Judge Conducing to the Good and safety of his People; for Example, if the Lords and Commons should Advise him to restore those Laws Spiritual, which in Queen Maries time were in Force, I think the King were by the Law of Reason obliged, without the help of any other law of God, to neglect such Advice.

This example lacks full force because the Philosopher is made to say that the final decision not to pass laws belongs to the king and does not go so far as to assert that the king could reintroduce the Marian Church laws without the assent of the Houses,⁷⁵ but that this is the drift of the argument may be gathered by pursuing the debate.

Lawyer: I grant you that the King is sole Legislator, but with this Restriction, that if he will not Consult with the Lords of Parliament and hear the Complaints and Informations of the Commons, that are best acquainted with their own wants, he sinneth against God, though he cannot be Compell'd to any thing by his Subjects by Arms and Force. Philosopher: We are Agreed upon that already. Since therefore the King is sole Legislator, I think it also Reason he should be sole Supream Judge. Lawyer: There is no doubt of that. . . .

much that assembly depends for its constitution, for its very existence on the king's will," and asks "after all, is not this body but an emanation of the kingly power?" It was this question that mainly worried Austin in the nineteenth century and he attempted to solve the difficulty by vesting sovereignty in the king, the Lords and the Electors of the House of Commons. This solution has been repeated with the refinement that Austin has described a "political" sovereign, though the "legal" sovereign must be the king in Parliament (Dicey, *Law of the Constitution*, 9th ed., pp. 72-76). But the sovereignty of Hobbes and Austin is not divisible between an electorate and a representative assembly, and the refinement is a desperate device to avoid deciding the basic nature of sovereignty. This problem of "continuity" is most profoundly handled in Hart's *Concept of Law*, Chap. 4.

⁷⁴ *Dialogue*, pp. 67-68.

⁷⁵ Maitland, writing to Leslie Stephen (*Letters*, ed. Fifoot, no. 368, p. 369), raised this question without answering it. "I have been speculating as to what T.H. would have said had he lived until 1688. If it becomes clear that your 'sovereign' is going to acknowledge the pope's claims, this of course is no breach of any contract between ruler and ruled (for there is no such contract), but is there not an abdication? Putting theory out of the question, which would the old gentleman have disliked most, Revolution against *Leviathan* or a *Leviathan* with the Roman fisherman's hook in his nose?"

And after a discussion about the nature and definition of law, which the Philosopher defines in terms of command and prohibition, the Lawyer remarks⁷⁶ that "by your Definition of a Law, the King's Proclamation under the Great Seal of England is a Law: for it is a Command, and Publick, and of the Sovereign to his Subjects. Philosopher: Why not? If he think necessary for the good of his Subjects. . . ." Hobbes therefore reached a position, consistent with his theory, which identified within the English constitution the sovereign with the king, though with some difficulty over legislative power, a difficulty resolved by excluding the Houses of Parliament from any higher role in the business of legislation than that of advice, counsel and formal assents.

Hobbes did not overlook the problems of recognition in identifying the commands of the sovereign. The essence of a law as announced by a Hobbesian sovereign was that it should carry "manifest signs that it proceedeth from the will of the Sovereign."⁷⁷ And in the *Dialogue*⁷⁸ after discussing public and private capacities of a sovereign, whether man or assembly of men, he adds that

for in the making of Laws (which necessarily requires his assent) his assent is natural: Also those Acts which are done by the King previously to the passing of them under the Great Seal of England, either by word of Mouth, or warrant under his Signet, or privy Seal, are done in his natural Capacity; but when they have past the Seal of England, they are to be taken as done in his politick Capacity.

Hobbes indeed regarded it as no part of the business of a subject to make question of the identity of the sovereign,⁷⁹ but he did regard the verification of sovereign commands as permissible and that verification depended "on the knowledge of the publique Registers, publique Counsels, publique Ministers, and publique Seales."⁸⁰ Such were the means by which the sovereign's laws were to be known, but they did not, so Hobbes insisted, have anything to do with the authority of the command, "for the Verification is but the Testimony and Record; not the Authority of the Law, which consisteth in the Command of the Sovereign only."⁸¹ For Hobbes then, obedience to the sovereign's command was not an obligation until it was effectively to be known. The sovereign could choose the mode of communicating, though he must publish his command before it

⁷⁶ *Dialogue*, p. 71.

⁷⁷ *Leviathan*, pp. 318-319.

⁷⁸ p. 162.

⁷⁹ *Leviathan*, p. 230. "The Author, or Legislator, is supposed in every Commonwealth to be evident, because he is the sovereign, who having been constituted by the consent of everyone, is supposed by everyone to be sufficiently known."

⁸⁰ *Leviathan*, p. 320.

⁸¹ *Leviathan*, p. 320.

assumed the quality of legislation. There is no evidence that Hobbes ever considered the forms of legislation as limiting the operation of sovereignty or indeed of supplying necessary information as to identifying the sovereign or the announcements of the sovereign's will. He would have rejected all modern attempts to harness *Leviathan* in this way. His sovereign was not only free from legislative trammels, he was free also from prior legal requirements as to forms of commands which indeed were within the sovereign's power alone to choose and employ. And the question was further pursued in the *Dialogue*⁸² where the Lawyer advances the view that subjects ought to be bound by legislative acts irrespective of actual knowledge. "Are not," he asks, "all Subjects Bound to take notice of all Acts of Parliament, when no Act can pass without their Consent." To which the Philosopher replies that "if you said that no Act could pass without their knowledge, then indeed they had been bound to take notice of them; but none of them can have knowledge of them but the Members of the Houses of Parliament, therefore the rest of the People are excus'd. . . ." Obligation depended on knowledge or the reasonable means of knowing the sovereign's command after that command was published, but the mode of publication Hobbes insisted was a matter of "verification," not "authority."⁸³

To this attribution of sole legislative power to the King, Hobbes appears to have allowed but one exception. In the course of the *Dialogue*⁸⁴ the interlocutors are discussing the post-Restoration Act of Oblivion which they agree was passed to pardon two kinds of offence, the offence against the King and the offences against his subjects generally. And the Philosopher refers to the actions of the Long Parliament against Charles I, "for which divers of them were Executed, and the rest by this our present King pardoned. Lawyer: Pardoned by the King and Parliament. Philosopher: By

⁸² *Dialogue*, p. 71.

⁸³ It follows that for Hobbes the antecedent way in which the sovereign will was formed had nothing to do with the validity of command. English judges have generally taken the same view of this matter. In 1653 John Streater was imprisoned by the Long Parliament for publishing seditious pamphlets and objected that he was imprisoned by virtue of an order of Parliament which lacked the authority of a regularly enacted statute. The judges of the Upper Bench, including Rolle C.J., dismissed his objection, Nichols J. saying: "Now what the parliament does, we cannot dispute or judge of: their laws are to bind all people; and we are to believe they had cause for what they did. And for that you say an Order should be read three times: when I was a Parliament Man, divers acts passed with one reading. In the next place you did distinguish between an order and an Act of Parliament. Why, their power is a law, and we cannot dispute any such thing." (5 *State Trials* 365 at p. 387). This was the command of an unicameral legislature, but the command of one chamber of a bicameral legislature raises a different question, and later lawyers had no difficulty in asserting that a resolution or order of one chamber could not be allowed the force of law, any more than the commands of both chambers could acquire legislative force without the king's assent.

⁸⁴ pp. 76-77.

the King in Parliament if you will, but not by the King and Parliament . . . ,” but he goes on to argue that where the subject was injured and no restitution made, then as to pardon “neither King, nor Parliament, nor any earthly Power can do it. Lawyer: You see by this your own Argument, that this Act of Oblivion without a Parliament could not have passed; because not only the King, but also most of the Lords, and abundance of Common People had received Injuries; which not being pardonable, but by their own Assent it was absolutely necessary that it should be done in Parliament, and by the assent of the Lords and Commons. Philosopher: I grant it. . . .”

This concession nevertheless seems an entirely exceptional admission by Hobbes and indeed more of a curiosity than a matter for concern. What is more of concern is that it was apparently very difficult to fit his theory to the facts of English constitutional law and practice. It was absurd by the latter part of the seventeenth century to make out a case which put the king's proclamation and the king's statute on the same legislative footing. Hale had little difficulty in demonstrating that Hobbes's treatment of English public law was faulty, though it is another matter as to his success in challenging Hobbes on the nature of sovereign power.

Hale's theory of legislative power⁸⁵ was that the binding force of laws depended on the consent of those to be bound by the enacted laws. That consent might be manifested in one of three ways, first, “by the immediate consent of all the persons concerned in the law to be made, as where upon the first coalition of a company of men, every man should agree to some certain laws which should be the rule whereby their intended governor should distribute justice to them.” Though Hobbes had admitted the force of consent in the institution of a commonwealth, Hale could not regard it as the validation of all subsequent laws, for the English Constitution was too ancient, he thought, for it to be known as a matter of fact whether such consent ever existed. He preferred to find obligation and the power to bind “by the immediate consent of that person or those persons in whom by the constitution of the commonwealth that power is placed for the government monarchical, aristocratical, democratical, or mixed.” This, he thought, was the origin of all positive law. As for customary law, that depended on such long and continued usage as implied such consent.⁸⁶

We need not pause to consider Hale's analysis of types of legislation. He distinguished measures making new laws and abrogating

⁸⁵ *Rights of the Crown*, Chap. 11.

⁸⁶ Cf. Hobbes's explanation of the continued existence of customary law as being a tacit command by the sovereign.

old laws as contrasted with those declaratory of existing law, but the power to make a declarative law was not the same in effect as the power to declare law. The former was a legislative function whereas the latter might be judicial. "The former binds all according to the extent of the act. The latter doth not extend *ultra partes litigantes*. If all the judges of England deliver their opinion in a point of law, it weights far as an authority in the like case, but yet it is not binding further than the parties concerned in that case."⁸⁷

Hale approached the question of legislative sovereignty by separating three propositions.

1. The King by the advice and assent of the Lords and Commons duly assembled in Parliament may make any new or declarative law, or repeal or abrogate any old law.
2. The King without any such advice cannot make any new, declarative or repealing law.
3. No power can make any binding law without the King's express authority, concurrence and consent.⁸⁸

Upon the first proposition Hale canvassed a variety of opinions upon the location of legislative power in the parliamentary context.

Some would have the power originally to reside in the Commons, and the consent to be only in the Lords and King as a convenient ceremony or formality, which, if it may be had, will do well, if not, it may be spared. Some would have this power in the Lords radically and the Commons to be only petitioners or proposers. Some would have it in the King, Lords and Commons co-ordinately, but yet so that either two should outbalance the third and carry the law.

These views he dismissed as "clearly false and frivolous, contrary to the constant usage and law of Parliament and the law of this Kingdom."

He then contrasted two further views, one that the legislative power is "radically and co-ordinately in all three but so that all their concurrence is requisite in the making of a law," the other that the legislative power is "solely in the King but yet so qualified, as he cannot enact without the advice of the Lords and Commons in Parliament assembled." Hale refused to attribute such significance to the difference between these propositions, "for what great odds is it whether Caius, Titius and Sempronius have power to make law

⁸⁷ Cf. in his *History of the Common Law*, at pp. 67-68.

⁸⁸ As Chief Justice he had occasion to refute judicially the third proposition. *Colledge of Phisicians v. Cooper* (1675) 3 Keble 587, a judgment wretchedly reported but containing very valuable information on the courts' requirement for proof of a statute. Coke's opinion was that an omission to record the assent of one of the houses prevented the court from accepting a faultily expressed enactment as an Act of Parliament: the *Prince's Case*, 8 Co.Rep. at 20b. But this opinion has not been unchallenged. Hale thought that the record of the King's assent was essential to the body of an Act, but that the assent of the Lords and Commons was sufficiently implied in the royal assent.

by all their assents, or Caius to make the law with the assent of Titius and Sempronius, only in point of dignity?" Nevertheless he selected the latter proposition as nearer the historical truth and as "more suitable to the frame of government here." After discussing at great length the various procedural changes in parliamentary history as to method and form, petitions and bills, enacting clauses, and so forth, he concluded that this evidence "joined with the sole power of summoning, continuing and ending of Parliaments in the King . . . seems to enforce that the power legislative resides in the King alone, though so qualified that he cannot enact a new law without the advice and assent of the three estates assembled in Parliament."⁸⁹

Elsewhere Hale in considering the consent of Lords and Commons wrote,⁹⁰

to supply and make up this qualification or limitation of the supreme power in the King is this concurrence necessary. And yet this concurrence without the King's consent makes not a law, and although by the duty of his kingly office he is bound to assent to all such laws, as likewise counsels, which are propounded and conduce to the good of the kingdom, yet is he likewise judge of what is good, wherein if he err, as it is possible he may, yet the counsel or law propounded wants that which makes it binding, if it wants that consent.

Hale therefore ascribed to the King legislative supremacy but not unqualified sovereignty as that attributed to Hobbes's sovereign. The limitless legislative power of Hobbes's sovereign was naturally deduced from the axiomatic idea that a person or body having supreme legislative power must by definition be free from and not subject to any higher control. Though Hobbes's sovereign was not necessarily a patriarchal monarch, he would have agreed with Sir Robert Filmer's assertion⁹¹:

We do but flatter ourselves, if we hope ever to be governed without an arbitrary power. No: we mistake; the question is not, whether there shall be an arbitrary power, but the only point is, who shall have that arbitrary power, whether one man or many? There never was, nor ever can be any people governed without a power of making laws, and every power of making laws must be arbitrary: for to make a law according to law is *contradictio in adjecto*.

To argue thus is essentially to deny the coercive force of any "fundamental" law in the sense of constitutional limits on legislative competence and to assert that there is no "fundamental" law

⁸⁹ The chapter continues with detailed discussion of proclamations, medieval petitions and other legislative material.

⁹⁰ *Prerogativa Regis*, Chap. 14.

⁹¹ *The Anarchy of a Limited or Mixed Monarchy* (1648) Laslett's ed. of *Patriarcha, and other Works*, p. 277.

beyond the reach of sovereign power. This question of fundamental law was at the centre of seventeenth-century constitutional controversies, and the literature is large,⁹² but here it is sufficient to understand what Hobbes meant by "fundamental" law. He defined it in *Leviathan*⁹³ in these terms:

a Fundamentall Law in every Common-wealth is that, which being taken away, the Common-wealth faileth, and is utterly dissolved; as a building whose Foundation is destroyed. And therefore a Fundamentall Law is that, by which Subjects are bound to uphold whatsoever power is given to the Sovereign, whether a Monarch, or a Sovereign Assembly without which the Common-wealth cannot stand, such as is the power of War and Peace, of Judicature, of Election of Officers, and of doing whatsoever he shall think necessary for the Publique good. Not Fundamentall is that the abrogating whereof, draweth not with it the dissolution of the Common-wealth; such as are the Lawes concerning Controversies between Subject and Subject.

Hobbes adhered to this definition which is consistent with his doctrine of sovereignty,⁹⁴ but which is not consistent with fundamental law as defined with reference to a higher authority to which a supreme legislator or legislature must conform. Hobbes nowhere supposes that his idea of fundamental law is one which can control his sovereign.

But this definition was not the definition of the common lawyers nor was it Hale's. They believed in governmental powers (including legislative powers) defined by a form of constitution or commonwealth which in its essential features was static and fixed. This fixed form was of course not to be found in any single document, not even (*pace* Coke) in Magna Carta, not even in any contemporaneous *Instrument of Government*. And in the absence of a written constitution it could only be found in the time-tested forms of the ancient constitutional practices of English government. One striking illustration of this belief was the occasion when after the inauguration of Cromwell's Protectorate, his Council

sent to the judges to consider and deliver their opinions whether the three kingdoms, by the fundamental laws of the kingdom, could be governed by the power and authority that is incident to a protector by the laws of the land. And Mr. Hales and most of the rest of the judges answered that the three kingdoms could not by the fundamental laws or by the constitution of the government of the three kingdoms be governed by a less power and

⁹² The modern work is J. W. Gough's *Fundamental Law in English History* (1955).

⁹³ Chap. 26, p. 334.

⁹⁴ In *Behemoth* (*E.W.*, vi, pp. 248-249) he writes: "I understand not how one law can be more fundamental than another, except only that law of nature that binds us all to obey him, whosoever he be, whom lawfully and for our own safety, we have promised to obey; nor any other fundamental law to a King but *salus populi*, the safety and well-being of his people."

authority than that due to the title or person of a King or Emperor.⁹⁵

There was, on this theory, a fundamental constitutional framework⁹⁶ which was beyond the power of a Hobbesian sovereign to alter so as to confer legitimacy on radical departures from that structure or framework. The lawyers did not deny that the sovereign (in their sense of that term) was "absolute"; he had complete and indeed supreme authority to act at his discretion within the legal framework of the constitution; they denied that he had "arbitrary" power, that is, power to act without reference to that constitutional framework. Since the constitution at any one time defines what is the legitimate exercise of power, the "common law sovereign" cannot, they reasoned, redefine the nature of his own being.

In advancing this theory of ultimate authority Hale's reply to Hobbes has incurred the reproach that he failed to understand Hobbes's position. Thus Holdsworth writes⁹⁷ that Hale

seems to have thought that the sovereignty, analysed and explained by Hobbes, necessarily meant that sovereignty of the king, which the royalist lawyers of the earlier Stuart period had maintained. To the term sovereignty he attached quite a different meaning. He interpreted it as simply meaning a supremacy, which was not incompatible with the supremacy of Parliament or the law in their respective spheres. As the king was personally above the law, as the sphere of his supremacy was wider, more active, and more general than the sphere of the supremacy of Parliament or the courts, it was natural to speak of the king as sovereign, and of his supremacy as sovereignty. Because Hale was a common lawyer, his political conceptions were naturally of a somewhat medieval type. In fact, neither the common lawyers, nor the majority of statesmen of this period had really assimilated Hobbes's theory of sovereignty or attempted to apply it to the concrete facts of English public law. . . .

⁹⁵ Sir Edward Nicholas to the Earl of Rochester, 7 April 1654, *Nicholas Papers* (Camden Soc., 1892), ii.64. It may be acknowledged that Hale himself took the Engagement of loyalty to the republican Commonwealth in 1649 and accepted judicial appointment in January 1654 (this latter fact did not escape the notice of the Rhodesian judges in 1968, *vide infra*, p. 153, n. 25). It is enough to say that Hale never conceded that his acceptance of a Cromwellian appointment carried an implication that he considered Cromwell entitled *de jure*. In so acting on the advice of royalist friends he justified himself on the ground that the ordinary civil and criminal law must continue to be administered "for the public necessity of the kingdom". But it is less easy to reconcile his subscription to the Engagement with his opinions on the inherently monarchical nature of the English constitution.

⁹⁶ On this question Bacon was in the common law tradition and Hobbes's definition of fundamental law did not owe anything to Bacon. See Aphorism 3 in book 8 of *De Augmentis* (Ellis & Spedding I, 804): "Magistratum autem auctoritas pendet ex majestate imperii et fabrica politiae et legibus fundamentalibus."

⁹⁷ *H.E.L.*, vi, pp. 206-207.

"No doubt," continued Holdsworth, Hale "would have admitted, with Sir Thomas Smith,⁹⁸ that king and Parliament acting together were the most 'absolute' power in the constitution. But in this part of his tract he was concerned with the king and his prerogative, and not with the power of king and Parliament; and, if we look at the position of the king as the head and director of the government, we must admit that it was not a wholly false representation of the facts to describe him as sovereign, *i.e.*, supreme, in his own sphere, although his powers were limited by law and by the necessity of getting the consent of Parliament to some of his acts."

This criticism is just in so far that it points out the historical bases of Hale's theory. He did believe in a "feudal" constitution and his "royalist" interpretation of the constitution was far removed from the idea that the king ruled as an unlimited sovereign and that there was no fundamental law. On the contrary, for Hale there was a fundamental law and the King's prerogative was one of the most important parts of it. But the criticism errs in attributing to Hale a misunderstanding of Hobbes's political theory. He understood it; he denied it as factually correct and he rejected it as politically desirable.⁹⁹

Of the factual correctness of the supremacy of the King in Parliament there could by the seventeenth century be no doubt. Before the Reformation there had existed Fortescue's doctrine of *dominium politicum et regale*,¹ but with Henry VIII's assumption of Royal Supremacy over the Church that theory had become an inadequate explanation of royal authority.² A long step had been taken from feudal and pre-Reformation kingship, but the modern notion of unlimited sovereignty was still far in the future.³ In the

⁹⁸ Sir Thomas Smith, *De Republica Anglorum* (1583) asserts the "absolute" power of Parliaments, but Smith's work is more valuable as a description than as an analysis of sovereign powers. Alston in his edition of 1906 (pp. xli-xliii) discusses the relationship between Smith and Jean Bodin. Bodin's *De Republica*, perhaps the most influential theoretical work of the late sixteenth century, contains a strong attack on Smith's vague views on the doctrine of sovereignty. Bodin refused to recognise mixed forms of polities and attributed sovereignty in the English polity to the monarch alone. For the English reception of Bodin's theory, see G. L. Mosse, "The Influence of Jean Bodin's *Republique* on English Political Thought," *Medievalia et Humanistica* (1948) v, pp. 73-83.

⁹⁹ The conclusion that Holdsworth was mistaken is fortified by the opinion of C. H. McIlwain in his paper on "Whig Sovereignty and Real Sovereignty," in *Constitutionalism and the Changing World* (1939), pp. 61-85.

¹ Most fully discussed in H. D. Hazeltine's General Preface pp. xxx-xl, to S. B. Chrimes' ed. of *De Laudibus Legum Anglie* (1949).

² Fortescue had allowed the Pope a part in the making of English law. See G. L. Mosse "Sir John Fortescue and the problem of papal power," *Medievalia et Humanistica* (1952) vii, pp. 89-94.

³ Christopher St. German wrote a number of pamphlets in defence of Royal Supremacy, 1533-35 (S.T.C. 21559-21588), advocating parliamentary control over the extended authority of the King, but significantly the exact relation between the Crown and Parliament is not fully explored. Modern discussions are J. J. Scarisbrick, *Henry VIII*, Chap. 12, on Royal Supremacy, esp. at pp. 508-515,

Tudor age, an age of peculiarly rapid transition in parliamentary power, constitutional ideas following events were in flux and had yet to harden,⁴ but "a lawyer's theory" of legislative authority did emerge, and one of the clearer statements may be found in the words of a future justice of the King's Bench, James Whitelocke, speaking in Parliament in 1610,⁵ upon the right of the king to impose import duties by letters patent.

"It will be admitted," he said, "for a rule and ground of state that in every government and commonwealth there be some rights of sovereignty, *jura majestatis*, which regularly and of common right do belong to the sovereign power of that state; unless custom or the provisional ordinance of that state do otherwise dispose of them: which sovereign power is *potestas suprema*, a power that can control all other powers, and cannot be controlled but by itself.⁶ It will not be denied that the power of imposing hath so great a trust in it, by reason of the mischiefs [that] may grow to the commonwealth by the abuses of it, that it hath ever ranked among those rights of the sovereign power. Then is there no further question to be made, but to examine where the sovereign power is in this kingdom; for there is the right of imposition.

The sovereign power is agreed to be in the King: but in the King is a two-fold power; the one in Parliament, as he is assisted with the consent of the whole state; the other out of Parliament, as he is sole and singular, guided merely by his own will. And if of these two powers in the King one is greater than the other, and can direct and control the other, that is *suprema potestas*, the sovereign power, and the other is *subordinata*, it will then be easily proved, that the power of the King in Parliament is greater than his power out of Parliament; and doth rule and control it; for if the King make a grant by his letters patent out of Parliament, it bindeth him and his successors; he cannot revoke it, nor any of his successors; but by his power in Parliament he may defeat and avoid it; and therefore that is the greater power. If a judgment be given in the King's Bench, by the King himself, as may be, and by the law is intended, a writ of error to reverse

and his comments on G. R. Elton's article "The Political Creed of Thomas Cromwell" T.R.H.S., 5th ser., vi (1956), p. 69, reprinted in *Historical Studies of the English Parliament* (1970) vol. 2, p. 193, where Thomas Cromwell is discussed as a constitutionalist of the Marsilian School and a protagonist of the true political and legislative sovereignty of "the modern mixed sovereign, the King in Parliament, created by the deliberate infusion of the modern principle of sovereignty into those two great achievements of the middle ages—the assembly of king, lords and commons, and the common law of the realm."

⁴ One of the best (though little quoted) discussions is William Dunham's "Regal Power and the Rule of Law: a Tudor Paradox," *Journal of British Studies* iii (May 1964) pp. 24–56.

⁵ H.E.L., vi., pp. 84–85. *State Trials* attributes the speech to Yelverton, but see Prothero, *Statutes and Constitutional Documents, 1558–1625*, pp. 351–353.

⁶ Whitelocke did not enlarge on this remark. He does not seem to contemplate the enactment of irrevocable legislation; on the contrary the more plausible interpretation is that the sovereign's laws are inherently repealable or alterable by the sovereign.

this judgment may be sued before the King in Parliament. . . . So you see the appeal is from the King out of Parliament to the King in Parliament . . . for in acts of Parliament, be they laws, judgments⁷ or whatsoever else, the act and power is the King's but with the assent of the Lords and Commons, which maketh it the most sovereign and supreme power above all and controllable by none."

This was substantially Hale's view and the deduction of sovereignty from not only legislative but judicial supremacy was likewise part of Hale's thinking. In discussing the claim of the House of Lords to be a final court of appeal,⁸ Hale wrote,

if this should be, that the supreme jurisdiction without appeal, the denier resort, were to the House of Lords, then is the legislative power virtually and consequently there also; or at least that power lodged in the King and both houses were insignificant. For what if the Lords will give judgment against an act of parliament, or declare it null and void? If they have the denier resort, this declaration or judgment must be observed and obeyed and submitted unto irremediably; for no appeal lies from their judgment, if they be the supreme court. . . . The truth is it is utterly inconsistent with the very frame of a government that the supreme power of making law should be in the King with the advice of both his houses of Parliament, and judgment should be in one of the houses without the King and the other.

Therefore, "wherever the denier resort is, there must needs be the sovereignty and so this word is constantly used and joined with it."⁹ In so saying he was doubtless distinguishing between a legislative and a judicial function, but he was also thinking of "the high court of parliament," the body which both ultimately made and interpreted the law, and which indeed was the descendant of a body not of legislators or judges but of lawgivers.

The sovereign power, as defined by Whitelocke and Hale, was therefore supreme and uncontrollable, that is, "absolute," but it was, for them, a power within and not above the constitutional framework. Here was the crucial difference between their sovereignty and the sovereignty envisaged by Hobbes. As a matter of constitutional history there can be little doubt that their sovereignty bore a nearer relation to the facts, but Hobbes was not, principally concerned with description. He was prescribing a model, for such was his artificial man and mortal god, *Leviathan*. Moreover, Hobbes's idea of sovereignty has in the modern world achieved such success that today it represents the conventional wisdom, not just of many political theorists, but of most modern common lawyers, from Mansfield

⁷ In the printed versions "grounds" for which the substitution is offered.

⁸ *The Jurisdiction of the Lords' House of Parliament* (ed. Hargrave 1796) at pp. 206-207.

⁹ *Op. cit.*, p. 205.

onwards. Sovereignty is generally no longer thought of as a principle of authority defined by existing legal bounds; it is political fact.¹⁰ And the ensuing difficulties have been very considerable, e.g., the legitimacy of successful rebellion in Rhodesia.¹¹ Hobbes himself would have found no difficulty at all. The recognition of his sovereigns was simply that their sovereignty was a matter of their capacity successfully to protect and command obedience of their subjects and it followed that sovereignty was an attribute of whomever could be identified as actually holding power to protect and command obedience.

Since Hobbes's sovereign stood above and anterior to the legal order, the principle of recognition was therefore simple. It was purely a matter of effective political control. As *Leviathan* was a mortal god, he might be reincarnated not once but many times. But the old common law idea of sovereignty which existed only within the existing legal framework could not accommodate and account for usurpation and successful rebellions so simply or so easily. It is not to be expected that a legal order can provide for the event of its own overthrow and supersession and the common law ideas of Hale and likeminded believers in the ancient constitution did not provide a general solution to the fact of revolutionary change. But the common lawyers of course recognised that as a matter of historical fact there had been successful rebellions and revolutions, not only the rebellion against the Stuart monarchy but the dynastic revolutions of earlier centuries. How did they deal with the question of obedience to usurped but established power?¹²

To establish Hale's reply to this critical issue, the question of civil obligation in the event of successful revolution in the legal order, it is desirable initially to restate his definition of sovereignty. He analyses in the first place the effect of laws upon the King.¹³

¹⁰ The present Lord Chancellor (extra-judicially, on adhering to the Treaty of Rome, *The Times*, 14 July 1971): "Like domicile or sex, sovereignty is a question of fact." Or if an extra-judicial utterance is not sufficient evidence of current judicial philosophy, *vide per* Lord Denning M.R. affirming as true the view of Professor H. W. R. Wade in [1954-55] C.L.J. at p. 196, that "sovereignty is a political fact for which no purely legal authority can be constituted" (*Blackburn v. Att.-Gen.*, [1971] 1 W.L.R. 1037 at p. 1040).

¹¹ See especially from the extensive literature, R. W. M. Dias, "Legal Politics: Norms behind the Grundnorm" (1968) 26 C.L.J. 233, and the most recent discussion, J. W. Harris, "When and Why does the Grundnorm change?" (1971) 29 C.L.J. 103. The general attempt has been to reconcile Kelsen's positivist theory with a denial of validity to the new legal order in Rhodesia. The latter article argues that such attempts have failed. There can be no doubt where Hobbes would have placed Rhodesian sovereignty today.

¹² How Hobbes and other political writers of the Interregnum debated the question has now been discussed by Quentin Skinner, *Conquest and Obligation: Thomas Hobbes and the Engagement Controversy*, in *The Interregnum*, ed. G. E. Aylmer (1972).

¹³ *Reflections*, pp. 507-508. And more fully in *Prerogativa Regis*, Chap. 11.

1. *Potestas Coerciva*. This extends to all the King's subjects, but doth not extend to the King, he is not under the Coercive Power of the Lawes. 2. *Potestas Directiva*, and this obliges the King and wee need not goe further for Evidence thereof then that Solemn Oath which he takes at his Coronation, the Iterated Confirmation of the greate Charter and those other Laws and Statutes that Concerne the Liberties of his subjects. 3. *Potestas Irritans*, and thus the Laws also in many cases bind the Kinge's Acts, and make them void if they are against Lawe. . . .¹⁴ No good subject that understands what he sayes can make any Question where the Sovereigne Power of this Kingdome resides. The Laws of England and the Oathes of Supremacy teach us that the King is the only Supream Governour of this Realme and as Incident to that Supream Power he hath among others these greate Powers of Sovereignty.

He then enumerates six such powers, the power of making peace and declaring war,¹⁵ the power of giving value and legitimation to the coinage, the power of pardoning the punishment of public offences, the power of distributing justice, the power of militia¹⁶ and raising forces by land and sea, the power of making laws. And he explains in some detail that there are certain qualifications upon these powers, especially in relation to the power of legislating and taxing. These powers were "the great *jura summi imperii*" that the laws of this kingdome have fixed in the Crown of England," and his whole treatment of sovereign powers in his reply to Hobbes and in the *Prerogativa Regis* makes it plain that he saw sovereignty as a bundle of rights, a concept of public authority, but that he did not define it in terms of a political theory which placed that collection of powers in an ultra-legal context. This being so he had to face the question of what happened to his sovereignty in the event of successful rebellion, the problem posed by the actual exercise of *de facto* power derived from conquest or civil revolution.

In the context of a legal definition this was a problem of the scope of treason and the limits of allegiance. In the fourth chapter of *Prerogativa Regis* he discussed the nature of allegiance, and since the

¹⁴ The reference is not to parliamentary acts of the sovereign, but to the numerous rules of law which voided the King's acts if not carried out in due form, e.g., alienation of royal lands without the use of the Great Seal and so forth.

¹⁵ In placing this power first, Hale probably did not intend to imply its primacy, but other lawyers did ascribe that status to this prerogative. E.g., Lord Nottingham in a parliamentary speech in 1678 (Sel.Soc. 79, p. 993) asserts "the right of making war and peace is so much the king's that in all kingdoms and states in the world this and this only is the true and essential mark where the sovereignty rests."

¹⁶ Hobbes himself saw the shift of sovereignty in the rebellion against Charles I in the seizure of military power, for in his view "the legislative power, and indeed all power possible, is contained in the power of the militia." (*Behemoth*, E.W., vi, p. 290).

nature of allegiance was a matter of fidelity to the sovereign, the critical question was the effect of usurpation. This he discussed in the sixth chapter of *Prerogativa Regis*.

The "root of title" was the Norman Conquest but history related "several usurpations of the Crown of England upon various pretences" [*i.e.*, claims of title] "since the acquest of King William." He relates in minute detail these historical episodes, particularly the depositions of Edward II and Richard II, and the transfers of regal powers between the dynasties of York and Lancaster in the fifteenth century, down to the seizure of regal power by the Tudor dynasty. The doctrine he evolved from his understanding of these vicissitudes of royal power may be summarised thus. First, there was the relation between two claimants for regality, and, secondly, there was the relation between any successful disseisor and the people. Upon the first relation, there were ten deductions. First, a king who voluntarily resigned was no longer king and was no longer owed allegiance. In the case of a king who was involuntarily deposed, Hale took the view that he was a king *de jure* but not *de facto*, but he was troubled by the case of Edward II whose murder after deposition had been later treated as treason. In this instance and for that reason he thought some character or element of regality survived deposition, though he did not resolve the question satisfactorily to himself or to others,¹⁷ and indeed his hesitant conclusion about the allegiance due to a deposed monarch was inconsistent with his general explanation of the effect of usurpation. As will be seen later, this general theory was that loss of *de facto* authority involved the loss of allegiance. But as between competing monarchs, it was clearly Hale's opinion that loss of power did not amount to forfeiture of title. Secondly, the heir of the deposed king who had never gained actual possession of the Crown, though he might assert a claim and attempt to regain the Crown, "yet till such regaining of his Crown, he is in the nature of a subject if he acquiesces to the possession of the usurper." As such, treason could not be committed against him.

Thirdly, if the heir regained possession of the Crown, "those acts that tend to the diminution of the royal power or revenue and are not merely transient acts nor executed in the time of the usurper, are not at all binding to the rightful heir of the Crown after his reassumption

¹⁷ This particular conclusion, that some element of regality survived deposition, caused Hale a severe and extended rebuke from Sir Michael Foster in his Fourth Discourse upon Crown Law, because Hale's opinion as published in the *Historia Placitorum Coronae* in 1736 naturally could be referred to the effect of the deposition of James II. Mr. Peter Glazebrook has recovered further unpublished passages on *de facto* kings in the *Hist. Plac. Coronae* from Hale's autograph and the transcript from which the printed work was published. These form an appendix to his edition of a new reprint of the *Historia*.

thereof.”¹⁸ Fourthly, those charters “as did not impair the revenue or regality of the King stood good if executed, in the time of the usurper. . . .”¹⁹ But if these charters were not executed in the time of the usurper but executory after his death, as a licence to alienate in mortmain or by a tenant *in capite*, not executed in the usurper’s time, [such charters] bind not.”

Fifthly, grants which do not bind the heir after regaining the Crown did not bind him even if they had been confirmed or granted by consent of Parliament. This was because where such Parliament had been called by a usurper, “though the laws be good to bind any that stand in the capacity of a subject,” the Acts of such Parliament could not bind the particular interest of the heir who regains the Crown. Sixthly, the heir regaining the Crown from the usurper is not bound by the grants of the usurper in matters of regal power or revenue “no more than the true lord is bound by the original grants by copy or otherwise of the disseisor.” On the other hand “the usurper comes in under the title of the right King, and therefore is bound by his grants; he is quodammodo a successor to the right prince, though not an heir or lawful successor.” Seventhly, “such things as are naturally avoided by the King’s death are avoided by a plenary usurpation.” Examples are judicial commissions and judicial process. Eighthly, “but where the usurpation is not complete but the rightful prince kept his ground, though there were a usurper in the kingdom, there was no determination of commissions or discontinuance of process, because when two are in possession the law adjudgeth him in possession that hath the right, and thus it was in the sixteen days’ usurpation of Queen Jane, for Queen Mary, the rightful possessor upon whom Jane usurped, still continued in the kingdom and held her regal title.”²⁰ Ninthly, “acquisitions made by the usurper whether by purchase or by conquest as King of England, do belong to the rightful prince reassuming the kingdom. And the reason is because he [the usurper] is *de facto* King and doth sustain the politic capacity of a King, though not to prejudice his successor.”²¹ Tenthly, Hale considered whether in relation to foreign

¹⁸ Examples of voided acts were grants of land and offices. Acts of resumption when enacted were therefore “to prevent the danger by provisoes and exceptions for those of the King’s friends rather than otherwise.”

¹⁹ Pardons to criminals and presentations of clergymen were examples.

²⁰ The problem of two competing *de facto* exercisers of regality is further explored by Hale in the recovered passages from the manuscript of *Historia Placitorum Coronae*, *supra*, n. 17. Accordingly Jane was not even a *de facto* queen in 1553 because she never gained undisputed control over the kingdom.

²¹ Since there is no question of inheritance, for the rightful prince is not heir to the usurper, Hale takes the principle of succession from the usurper as a corporation sole. This rule of acquiring benefits but not burdens by succession to the wrongful occupant of a corporation sole had been worked out originally in connection with ecclesiastical corporations sole, e.g., abbacies.

affairs, the acts of a usurper "engage the rightful prince after his regress." He reached no decided opinion on this question "but doubtless *de facto* the foreign peace or the foreign war continues till a new capitulation, treaty" or other settlement.

These propositions on the face of them appear to fail to answer the question how one is to distinguish "the rightful prince" from "the usurper," since as a matter of fact the successful usurper will require the courts to treat him as the rightful prince. The explanation seems to be that Hale was applying to the question of rightfulness in relation to the Crown familiar ideas of seisin and disseisin. The disseisor acquired all the substantial benefits of possession and retained them while seised; the disseisee was left with a mere claim. Disseisin did not confer title as a matter of ultimate right but the law accorded to the fact of seisin even if wrongfully acquired recognition to an extensive degree, and this idea apparently formed the background to Hale's thinking on this question.

But the more important question, in relation to the obligation of the subject, was the consequence of usurpation as affecting the relation between the usurper and the people. Hale on this point had no doubt that a successful usurper was a king *de facto* and sustained "the politic capacity of a king, at least in reference to the people who have submitted to him." In the first place, he held that "if there be a plenary usurpation and possession of the Crown, those acts of voluntary jurisdiction that are transient and for the public necessity of the kingdom stand good notwithstanding the regress of the lawful prince." To this proposition there was the exception that acts executory but not executed in the time of the usurper "would not hold in the time of regress," but otherwise the ordinary acts of government remained valid. Secondly, in the case of a plenary usurpation "the acts of Parliament not relating to the particular propriety of the rightful prince stand good notwithstanding the regress of the rightful prince."²² Thirdly, judicial process and judicial commissions came to an end by usurpation "as well as they would have done by the death of the king," but judicial process and commissions revived on resummons and recommission by the usurper. Fourthly, judicial proceedings in the name of the usurper retained validity after the regress of the rightful prince, even without the aid of an Act of Parliament,²³ and existing proceedings might be revived

²² In 1660 the whole legislation of the Interregnum was considered as no longer in force, but this was on the theory that no Act which had not received the assent of Charles I or Charles II could be considered an Act of Parliament, and there was no attempt to treat as illegal ordinary acts of government executed under the authority of that legislation.

²³ Acts of ratification, such as 4 Edw. 4, c. 1, were therefore not acts of necessity but merely *in abundantiore cautela*. If the usurpation was not complete or the usurper was not in effective control, Hale was of the opinion that "there

by resummons. "And the reason is because it is an act of necessity, though by the usurpation the people have lost the fruition of their rightful prince and his protection, yet they have not lost the interest they have in their laws."²⁴

All these propositions Hale advanced to determine the legal results of a usurpation where one king superseded another. He did not proceed to consider the effect of a change in "the nature of government," a republic superseding a monarchy or the like. His treatise was concerned with the powers of monarchy and it was enough for him to consider *de facto* power in that context. And he believed that allegiance was owed to a *de facto* king.

It is at this point that Hobbes and Hale may be said to join hands. As widely separated as they were on the theory of sovereignty, and the issue of its illimitability, it is quite clear that within the framework of the monarchical government of England Hale asserted the duty of present obligation to obey the present and plenary power of a *de facto* king whatever the hereditary or other defects in his title.

Since this opinion has been recently subject to serious challenge both on grounds of history and law with reference to the Treason Act of 1495,²⁵ some comments may be offered in conclusion. Debate has centred around the meaning to be given to the 1495 statute of Treason. The Act of 1495 (11 Hen. 7, c. 1), which Henry VII passed in the shadow of invasion by the Yorkist pretender, provided that any person or persons

that attend upon the King our sovereign lord of this land for the time being in his person and do him true and faithful service of allegiance . . . be in no wise convicted or attainted of high treason nor of other offences for this cause by act of parliament or otherwise by any process of law, whereby he or any of them shall forfeit life, lands, tenements, rents, possessions, hereditaments, goods, chattels, or any other thing, but to be for this deed and service utterly discharged of any vexation, trouble or loss; and if any act or acts or other process of the law hereafter . . . happen to be made contrary to this ordinance, then that act or acts or other process of the law . . . should be void. Provided always that no person or persons shall take any benefit or

an Act of Parliament might be of necessity to 'confirm the transactions judicial in the time and place of such usurpation, and cites 1 Mar. c. 4, which "though as to bonds and indentures dated in the year of Queen Jane was needless, yet possibly, it might be of some use as to statutes and recognizances."

²⁴ Hale's analogies at this point are instructive. "A disseisor of lands may assign dower to one that is lawfully entitled thereunto and it shall bind the disseisee after his re-entry. A disseisor of a copyhold manor may make admittances. A disseisor of a manor to which there is a leet appendant may hold his court baron or leet, and determine plaints and take presentments as to matters determinable by those jurisdictions, and such judgments are effectual."

²⁵ A. M. Honoré, "Allegiance and the Usurper" [1967] C.L.J. 214. The judgment of the Appellate Division of the Rhodesia High Court in *Madzimbamuto v. Lardner-Burke*, 1968 (2) S.A. 284 is largely an exegesis on the Act of 1495.

advantage by this act which shall hereafter decline from his or their said allegiance.

Professor Honoré has argued that this was a promise by Henry that should the pretender oust him, he (Henry) on regress would not treat as treasonable any adherence to the usurper after the usurper had gained power, but it left at risk and unprotected those who actively assisted the pretender to usurp.²⁶ Historically, this seems implausible. In the autumn of 1495 it seem improbable that Henry and his Council should be planning for such contingencies, the aftermath of a second Bosworth. The statute seems rather a rallying measure and read in that light it makes sense.

The preamble opens with the words "the King our sovereign lord calling to his remembrance. . . ." This means Henry and the statute must be read as if spoken by Henry himself. Subjects must serve "the prince and sovereign lord for the time being." This means Henry and his successors, but surely only successors who on Henry's reckoning were legitimate, *e.g.*, his son Arthur if he himself fell in battle. He could not have referred in the phrase "sovereign lord of the land for the time being" to a person who had from his standpoint no claim whatsoever to that title. To the supporters of himself and his dynasty he addresses himself and promises protection if they join his standard. The proviso makes it clear that this promise is not extended to those turncoats who join him and subsequently desert him, persons who might otherwise claim the protection of the Act by virtue of having actually joined Henry in the field before deserting him.

The objection to this reading of the text is that such a promise is valueless in the event of Henry's overthrow by the usurper. The successful usurper would repeal the statute and then attain Henry's adherents. It may well be for this reason that the Act contains the words purporting to avoid future acts of attainder and to nullify future contrary statutes. Even if such an attempt to pass unrepealable legislation would have been ineffective, it affords evidence of what was intended. Moreover, Henry's Act would stand until the usurper was sufficiently established to call a Parliament²⁷ and pass punitive

²⁶ Honoré at p. 220 argues that "the promise of immunity might actually help Henry recover the throne from a future Richard IV because moderate men who had not rebelled in the first place would know that their support for Richard in the interim period would cost them nothing provided they returned to their first allegiance." But Henry's promise as construed by Honoré does not stop at "moderate men." It includes all those who for the first time join the usurper after he has gained possession and then fight to the last stroke to repel Henry's regress; it excludes only those who helped to turn Henry out.

²⁷ Henry may well have recalled that on his own accession in 1485 he had found it necessary on the advice of the judges to secure the reversal of the attainders on his own supporters before it was possible for them to assist in the measures of his first Parliament, which included the parliamentary confirmation of his own title to the Crown. See Bacon, *infra*, n. 29, pp. 37-38.

legislation, and a limited degree of protection would be better than none. But the practical consideration was to rally support²⁸ and raise the spirits of Henry's supporters. It seems correct therefore to construe the statute as a thoroughly "lancastrian" measure.²⁹ Henry was taking immediate measures for the protection of his Crown; he was not writing into the Statute Book an advance pardon to some adherents of a successful usurper.

But in the hands of lawyers seeking a legal sense of the text the statute has become a statement that allegiance is due to a *de facto* king.³⁰ And apart from doubts expressed by Blackstone, this has been the theme of the textbooks from Coke onwards. And even Professor Honoré's interpretation reaches the conclusion that the statute "endorses the general principle of allegiance to the king for the time being" in the sense that it is no breach of allegiance against the dispossessed king to adhere for the first time to a usurper after he gained a plenary power.

The difficulty about the Act, and that which troubled Blackstone, is that the full *de facto* interpretation seems to make a shifting sand of the idea of allegiance. Even if it be allowed that Henry and his Parliament had no thought of pardoning adherence to his enemies in the slightest degree, it is impossible to deny that such has been the general interpretation of lawyers who in later ages could not or did not place themselves imaginatively in the exigencies of 1495 and who instead construed it as a mere text. They generally treated the question as one of law, not of history, and arrived at the conclusion that the *de facto* monarch was entitled to allegiance and to obedience. And this was certainly Hale's view.

But apart from the problems of the statute, the last question to be answered was whether sovereignty could survive a successful and plenary usurpation. On Hobbes's definition of sovereignty, his answer was a clear negative, for his sovereignty was not ultimately a right or a rule, but the very political fact of effective power to command obedience. Hale likewise returned a negative answer, but

²⁸ See also the proximate Act of 11 Hen. 7, c. 18; cf. 19 Hen. 7, c. 1.

²⁹ As does Reeves, *History of English Law*, vi, p. 132, and Bacon in his *History of the Reign of Henry VII*, Ellis & Spedding, vi, pp. 159-160, writing, it may be noticed, from the standpoint of historians. The *de facto* interpretation, on the other hand, occurs in works which are expositions of law. The most cogent argument based on the phrase "king for the time being" is Thomas Carte's in his *General History* (1750), Vol. 2, pp. 847-848, contrasting the implied legitimacy of title with the use of *de facto* descriptions. But he admits that Henry in encouraging his supporters followed "his own way, ever dark, double and mysterious."

³⁰ Hale, *Historia Placitorum Coronae*, i, p. 273, observes "this act extendeth to a king *de facto*, though not *de jure*, for such in truth was Henry VII." This amounts to saying that Henry did not regard himself as a king *de jure* and that he passed the Act to protect his supporters as adherents to a *de facto* king. Historically considered, this is of course absurd.

on very different grounds, for in his eyes sovereignty was a title to rule and govern and only recognisable in this country within the system of monarchical government, and that title had to be based on principles of public law, on the principles which themselves determined the framework of the system. The system had nevertheless to provide for political realities which included historically not a few usurpations of the Crown. To assimilate the fact of usurpation he had resort to the notion of disseisin.³¹ The usurper was likened to the disseisor. But while disseisin conferred on the disseisor the very estate and the legal authority to use, to enjoy, to dispose, it did not extinguish the claim of the disseised. The disseisor's heirs might inherit and his and their title was good against all save the claimant who could prove a better, because it was the more ancient, seisin of his ancestors. How then might that claim to the Crown be vindicated? The answer must be by force, that is, by battle. And if it be thought that that answer could not properly lie in the mouth of a common lawyer, we may press the analogy further and recall that where in the primeval common law the issue arose which of two contenders was entitled as a matter of hereditary right, that ultimate right was in the last resort put to the judgment of God, that is, to battle.

³¹ This was no new way of considering the question; see the case of Bagot's Assize, Y.B. Pasch. 9 Edw. IV, f. 1b, pl. 2. The case is discussed at length in an editorial note to the *Historia Placitorum Coronae*, p. 101, n. (f). But Hale in the *Prerogativa Regis* was the first to apply the idea generally to constitutional theory and to deduce in detail its implications.

COVENANTS—"A BROAD AND REASONABLE VIEW"

H. W. R. WADE

THE law about covenants running with land is once again behind the times. It is undoubtedly in need of statutory reform. It is also, perhaps, an apt subject for this jubilee issue. For among the articles published in the earlier years of this Journal few can be better known, and none can have given more needed help, than Professor Bailey's *The Benefit of a Restrictive Covenant*,¹ in which the complexities of an excessively intricate topic of real property law were analysed and expounded with great care and clarity. Published in 1938, it remains a source of valuable guidance to-day. In the meantime there have been many decisions, and there are now proposals for legislation. But in the following pages the reader will not find an objective and comprehensive survey comparable to Professor Bailey's. It is proposed to discuss only one or two controversial aspects and the questions of legal policy bound up with them.

In 1965 the Wilberforce Committee recommended legislation to enable positive as well as negative covenants to run with land so as to bind the owner for the time being.² The distinction between positive and negative covenants was made sharp and fundamental by the decisions of the nineteenth century. The judges who made it were probably wise in their generation, for a new kind of incumbrance needs to be introduced with all possible circumspection. But now this hallowed principle appears arbitrary, and it impedes transactions in land which have become socially desirable. An underlying cause is the decay of the leasehold system. In the past the rule that positive covenants could not run with freehold land was easily evaded by granting leases, under which a much tighter degree of control could be imposed. To-day landlords have been made the objects of so much political odium, and of so much restrictive and confiscatory legislation, that leasehold development, if not a dying industry, is at any rate an ailing one. Yet if a block of flats is built and the units are sold freehold, there are great legal difficulties in obliging future owners to keep up a proper standard of repair, contribute to the cost of common services and amenities, and so forth. These

¹ (1938) 6 C.L.J. 339.

² *Report of the Committee on Positive Covenants Affecting Land*, 1965, Cmnd. 2719; referred to subsequently as "Wilberforce Report." Proposals for implementing parts of the Report are contained in the Law Commission's Published Working Paper No. 36, *Appurtenant Rights* (July, 1971), pp. 19 *et seq.*

difficulties have proved so serious that many building societies refuse to take mortgages of freehold flats, some local authorities will not make full advances on them, and planning authorities find themselves unable to enforce covenants taken in connection with their planning functions.³

Combined with this tendency towards freehold and away from leasehold is the tendency of an overcrowded population to live in "developments" where they are more and more dependent upon shared amenities such as roads, stairways and gardens, and where lapses by individual owners from the general standards of repair and maintenance will affect the amenity and value and even perhaps the physical stability of neighbouring homes. The law has failed to provide any mechanism by which the necessary obligations can be made to run satisfactorily with freehold land—and true as it may be that equity is not to be presumed to have passed the age of child-bearing,⁴ there seems to be little prospect of a twentieth-century *Tulk v. Moxhay*⁵ to extend the law in the right direction. One innovation of considerable potentiality was indeed made in *Halsall v. Brizell*.⁶ In that case Upjohn J. by some unexplained alchemy distilled from an ancient and narrow rule a novel and widely generalised proposition that a person who takes benefit under a deed must also accept its obligations, and he used that proposition to enforce a long-standing obligation to contribute to the cost of maintaining roadways and other common amenities on a developed estate in just the way the Wilberforce Committee would wish. But even if it should prove that a powerful new force has here been conjured up, it can hardly be left to develop, by trial and error, at the leisurely tempo of the doctrine of *Tulk v. Moxhay*, which took well over half a century to reveal even its main outlines.⁷ The Wilberforce Report makes out a clear case for early legislation.

But what sort of legislation should it be? Many other countries have enacted elaborate laws for regulating property rights in multiple developments. A typical example is the Conveyancing Strata Titles Act 1961 of New South Wales, recommended in the Wilberforce Report as a good model for Britain and epitomised in one of its appendices.⁸ This provides an optional system which a developer may adopt by registering a plan with the approval of the local authority. Thereupon the proprietors collectively become a corporate body which can sue and be sued, employ servants, etc., and which has specified powers and duties for managing the whole

³ Wilberforce Report, paras. 5, 7.

⁴ Attributed to Harman J.: see (1951) 67 L.Q.R. at p. 506.

⁵ (1848) 2 Ph. 774.

⁶ [1957] Ch. 169. See [1957] C.L.J. 35.

⁷ See Megarry & Wade, *Real Property* (3rd ed., 1966), p. 758; referred to subsequently as "M. & W."

⁸ Para. 42 and Appendix B.

unit. Common property such as staircases, drives and gardens is held by the proprietors as tenants in common, and they have cross-easements of support, shelter, water supply and other services, with rights of entry to do repairs in case of need. Management generally is in the hands of an elected committee of from three to seven proprietors elected annually, whose powers are defined in numerous bye-laws scheduled to the Act but subject to variation by unanimous vote of the proprietors. A proprietor's voting rights, share of the common property and liability to common expenses are in proportion to the size and value of his lot as prescribed in the registered plan. There are many other detailed provisions, including bye-laws regulating the rights and duties of the proprietors *inter se*. A scheme of this kind, therefore, not only provides a much greater and more convenient range of proprietary rights and duties than does the ordinary law of real property: it also contains its own private system of constitutional and administrative law, a system of no little intricacy. The new range of property rights is an indubitable advantage. But the elaborate constitutional arrangements might well prove counter-productive in terms of friction and litigation.

More or less similar legislation is to be found in many other countries.⁹ In some of them the law of property has thrown out a new branch, known in North America as the law of condominium and in Australasia as the law of strata titles. Scotland has "the law of the tenement" which provides automatically for certain minimum rights and obligations in horizontally divided buildings, though these need usually to be supplemented by express covenants; and there is a well established type of management scheme which works through the appointment of a factor.¹⁰ Most Continental countries have specific legislation.¹¹ England seems well behind the rest of the western world, managing as best it can with the judge-made law of building schemes, a branch of the law of restrictive covenants which can be traced to an origin even earlier than *Tulk v. Moxhay*.¹² Under this primitive régime the burden of a positive covenant cannot run with freehold land at all. Furthermore, the régime itself is uncertain in important particulars, as is shown by several recent decisions of the courts which contradict familiar textbook rules.¹³

⁹ For recent legislation in Australia, Canada, Ceylon, Jamaica and Singapore, see *Annual Survey of Commonwealth Law* [1968] p. 392, [1969] p. 342, [1970] p. 584. For the U.S.A. see Powell, *Real Property*, ch. 54.

¹⁰ Wilberforce Report, paras. 39, 40.

¹¹ *Ibid.*, para. 39.

¹² *Whatman v. Gibson* (1838) 9 Sim. 196, antedated *Tulk v. Moxhay* by a decade.

¹³ The rules laid down in *Elliston v. Reacher* [1908] 2 Ch. 374, affirmed [1908] 2 Ch. 665, are modified in *Baxter v. Four Oaks Properties Ltd.* [1965] Ch. 816 (holding that the estate need not have been laid out in lots for sale) and *Re Dolphin's Conveyance* [1970] Ch. 654 (holding that neither a common vendor nor lotting were necessary).

The Wilberforce Committee recommended radical changes. They proposed that both burden and benefit of positive covenants should run with the land burdened and benefited in much the same manner as at present with restrictive covenants.¹⁴ Thus a covenant to carry out work on the covenantor's land, or to contribute to the cost of work carried out elsewhere, would run with land provided that it was intended to operate to the advantage of specified land and could in fact so operate. The benefited land would be either that of the covenantee or of a third party, in the case of work to be done on the covenantor's land. But in the case of payment for work to be done elsewhere, for example maintenance of a staircase or lift, it would normally be the covenantor's own land. In the latter case the land benefited by the work must be distinguished from the land benefited by the payment. The Committee are not explicit about this. But it seems safe to assume that their general recommendations about the running of benefit and burden would make the benefit of such a "money covenant" run with the staircase or other property for the upkeep of which the payment is made. It seems also to be assumed, though perhaps less safely, that the recommendations do not extend to covenants for mere services, such as the removal of refuse, or for mere facilities, such as the allocation of car-parking space. The Committee's definition is "works to be executed on other land and intended for the benefit of the covenantor's land or of specified land including the covenantor's land"; and although "benefit" is to include anything conducive to more convenient enjoyment, "works" is apparently to include only works of construction, planting, digging, etc., and their consequent maintenance.¹⁵ But it is not obvious why covenants by flat-owners to pay for emptying dustbins or for parking space should not be within the scope of the proposed new rules, even where a statutory scheme of management is not adopted. In a large block of flats it may be desirable that the owners should be committed to taking common services and that there should be no contracting out.

But these are matters of detail. The outstanding feature of the report, as it may seem to property lawyers, is that the Committee did not suggest that there were any real objections to making positive covenants run as freely as negative covenants. Since the present lack of this facility imposes serious handicaps on the management of land, the definition of "restrictive" covenants, so carefully preserved by generations of Chancery judges, turns out to have been both unnecessary and harmful. In developing the new proprietary interest which *Tulk v. Moxhay* brought into being, it was natural for them to

¹⁴ Para. 10.

¹⁵ Para. 13.

proceed with caution, and to bear in mind the time-honoured policy of limiting the kinds of incumbrance which can be imposed upon the freehold. But the conditions of modern life, particularly city life, demand more complex interests in land. The property law of the nineteenth century was highly individualistic, and it is not surprising that it made little provision for freeholders living like battery hens in urban developments where as much as 70 per cent. of the land area may consist of drives, lawns, gardens and playgrounds¹⁶—assets which belong to none of them personally but are socially necessary for them all.

The only substantial difference which the Committee would make between positive and negative covenants concerns the persons on whom the burden of the covenant should fall. A negative covenant will of course bind any occupier of the burdened land, even a squatter. If this doctrine were extended to positive covenants, a temporary occupier such as a short-term tenant might find himself liable for heavy repairs or expenses of a long-term character, such as rebuilding main walls or contributing to the replacement of a lift. The Committee therefore conclude that the freeholder only should bear the burden, and that it should be left to him to bargain with his tenant for any corresponding obligation or indemnity.¹⁷

A technical difference, however, is suggested in connection with registration. No problem arises in the case of land with registered title, since positive covenants would be noted on the title in the same way as negative covenants are noted now.¹⁸ In the case of land with unregistered title, however, there are the notorious and insuperable difficulties created by the Land Charges Act 1925. As was pointed out by the Committee on Land Charges,¹⁹ and also in this Journal,²⁰ the system set up by that Act is both fundamentally faulty and incurable and is particularly unsuitable for covenants which appear on the title to the land—although the Act applied it compulsorily to post-1925 restrictive covenants on freehold titles.²¹ The Committee on Land Charges were inclined to suggest that the lesser evil was to revert to the pre-1926 law, which was governed by the doctrine of notice.²² The Wilberforce Committee make the same suggestion more emphatically, as regards positive covenants.²³ It will obviously be a nuisance to have one law for pre-1926 restric-

¹⁶ *Ibid.*, para. 6.

¹⁷ Para. 20.

¹⁸ *Ibid.*, para. 24.

¹⁹ 1956, Cmnd. 9825 (Chairman, Mr. Justice Roxburgh), especially para. 22.

²⁰ H. W. R. Wade, "Land Charge Registration Reviewed" [1956] C.L.J. 216.

²¹ Land Charges Act 1925, ss. 10 (1) Class D (ii), 13.

²² Cmnd. 9825, para. 11.

²³ Wilberforce Report, para. 27.

tive covenants and all positive covenants, and another quite different law for post-1925 restrictive covenants; but absurdities are inescapable so long as the Land Charges Act remains in force.

Making the benefit run

The foregoing sketch of some of the Wilberforce Committee's salient proposals has omitted to mention one which will interest all concerned with conveyancing. This is that there should be strict formalities. It is recommended that a covenant should run with freehold land only if in the instrument creating it (a) some statutory phrase, such as "covenant *in rem*," is employed; and (b) "both the land benefited and the land burdened are plainly identified either by a plan or by an adequate description."²⁴ Although the Committee were concerned only with positive covenants, they suggested that the same requirements should be applied to negative covenants also.²⁵ They say: "The legal profession consider the present rules relating to annexation and assignment unnecessarily technical and difficult to apply and would like to see them modified so that the existence and extent of a covenant can be readily ascertained in all cases."²⁶

As this quotation indicates, the Committee are thinking principally of the problem of annexing the benefit to the dominant land. Transmitting the burden with the servient land presents virtually no difficulty, since covenants intended to run with land are nearly always imposed in a disposition of the servient land which necessarily identifies it. In covenants where there is no disposition, such as preservation covenants made with the National Trust, the servient land will likewise be identified. It is the dominant land which is so frequently left in obscurity, as the constantly accumulating case-law about annexation, assignment and building schemes eloquently testifies. It is from all this that the Committee would like to cut free by imposing rigid rules of formality.

It is interesting to contrast the Committee's policy with the opposite policy for negative covenants at present being pursued by the courts. After making much heavy weather over the transmission of the benefit, and so producing a body of law of notorious and unnecessary difficulty, the Chancery judges have now for twenty years been striving to relax their own rules. They have been working towards what might be called implied annexation, where there is no requirement of any formality but the decisive factor is the intention of the parties to the covenant, as inferred not only from its language

²⁴ Paras. 15, 16.

²⁵ Para. 17. The Law Commission's Working Paper (above, n. 2), pp. 64, 84, is apparently, though less clearly, to the same effect.

²⁶ Para. 15.

but also from the surrounding facts at the time when it was made. The tendency is thus to assimilate the law of covenants to the law of easements, where no formalities are required for establishing the right as appurtenant to the dominant tenement.

This policy is uncomfortable to conveyancers, who inhabit a world of paper and ink in which all important facts are expected to be clearly stated in documents of title. If only mankind could be trained to record facts and intentions methodically, it would save costly research, troublesome argument and all the inconvenience of investigation into past events. It is also desirable to clear titles of dubious or obsolete incumbrances. But these are two quite different objectives. The way to clear titles is not to fill the law with formalistic traps and pitfalls so that only the most artfully drawn covenants will run: for then property rights which are both valuable and socially desirable are as likely to be destroyed as any others.²⁷ The right course is to facilitate the discharge and modification of covenants under the Law of Property Act 1925, s. 84—and steps to this end have been taken in the Law of Property Act 1969, s. 28. Judges see many cases in which some requirement of formality defeats its own ends because it happens so frequently that those for whose protection it is provided fail to make use of it. In that case their transaction is void—for otherwise the requirement of formality cannot be enforced. The injustice of this result, where the omission is venial, constantly tempts judges to strain the law, and often they yield to this temptation. No one familiar with the case-law produced by the Statute of Frauds will need to be told this.²⁸ The courts have likewise preferred to distort the provisions of the Land Charges Act 1925, which requires registration of a number of interests which many people pardonably omit to register, and which in default of registration makes the interest void against a later purchaser, even if he has actual notice of it. The result is so unreasonable in some cases that the courts have in effect refused to apply the Act, because it would "perpetrate the grossest injustice."²⁹ This is an extreme example of conveyancers' legislation defeating its own ends.

²⁷ See Preston & Newsom, *Restrictive Covenants* (4th ed., 1967), preface. It is there explained how the over-complex case-law used to clear titles more thoroughly, though more arbitrarily, than did the statutory machinery; and how the right remedy is to improve the statutory machinery.

²⁸ See, e.g., *M. & W.*, p. 554 *et seq.*

²⁹ *Ives (E.R.) Investment Ltd. v. High* [1967] 2 Q.B. 379 at p. 396 (Lord Denning M.R.). The Court of Appeal held that an easement of a kind capable of existing only in equity before 1926 was not an "equitable easement" within the meaning of the Land Charges Act 1925, s. 10 (1) Class D (iii), in order to avoid defeating the claim of the owner who had failed to register. For a later case where the court applied the Act and accepted the injustice, see below, n. 58.

Accordingly there may be said to be two opposing views: the "conveyancers' view," if it may be so called, which advocates compulsory formality; and the "judicial view" which at present inclines away from formality, and which at all times is concerned to temper the injustice which compulsory formality entails. The authority of Lord Wilberforce can be invoked on both sides of the argument: for his Committee were clearly dominated by the "conveyancers' view," while in his judicial capacity he has made a notable contribution to the "judicial view," moving in the opposite direction. Since it is to be hoped that legislation based on his Committee's report will not be much longer delayed, it is clearly important to decide whether their recommendations about formality are acceptable. The question is very much one of degree. No one complains that it is excessively strict to require that freehold land should be conveyed by deed. But the law of restrictive covenants is at present being judicially purged of an overdose of formalism. The Committee themselves say³⁰: "Annexation to the land can be effected by the use of the proper wording in the conveyance imposing the covenant, but all too frequently the appropriate formula has not been used. . . ." In such situations, surely, the right solution is to prescribe not more formality but less, even at the cost of some practical inconvenience in some cases. Why should not the dominant land be identifiable as informally in the case of a covenant as in the case of an easement? It is worth seeing how far the law has already gone in that direction, which may be a good deal further than the above quotation would suggest.

The benefit of a covenant could run with land at common law for many centuries before the burden of it could run in equity. For this purpose no formality was requisite. Familiar examples, extending over a period of nearly six centuries, are covenants to sing mass in the chapel of a manor,³¹ to keep river banks in repair,³² and the traditional vendor's covenants for title.³³ In these cases it was obvious what land was benefited. A covenant to repair river banks, for example, benefits the land which will otherwise be flooded. To have required the benefited land to be formally identified would have been absurd. The law for covenants was accordingly the same as for easements in this respect, and it did not matter whether the covenant was positive or negative.³⁴ If the burden of positive covenants is now

³⁰ Wilberforce Report, para. 15.

³¹ *The Prior's Case* (1368) Y.B. 42 Edw. 3, Hil.pl. 14; Smith's *Leading Cases*, 13th ed., i, 55. ³² *Smith v. River Douglas Catchment Board* [1949] 2 K.B. 500.

³³ See *Rogers v. Hosegood* [1900] 2 Ch. 388 at p. 396 (Farwell J.). The law is now statutory: Law of Property Act 1925, s. 76 (6).

³⁴ See *Westhoughton U.D.C. v. Wigan Coal & Iron Co. Ltd.* [1919] 1 Ch. 159 (covenant not to let down surface of land). Swinfen Eady M.R. well explains (at p. 170) the simplicity of the rule at law: "the covenant is made with

to be allowed to run, the question arises why the long-established common law about the benefit, which in this aspect has never given rise to difficulty, should not be allowed to continue. Why introduce complication and formality?

The Wilberforce Committee do not mention this question. But the answer, it is surmised, is that some positive covenants are as inherently obscure as are most negative covenants. A negative covenant, being a covenant merely to abstain from some action, usually tells nothing about what land, if any, is benefited by its observance. It was presumably for this reason that, when negative covenants came into fashion after *Tulk v. Moxhay*, the courts felt obliged to insist on some sort of indication of the benefited land—though, as we shall see, they were content with a loose formula which could be given meaning only with the aid of extrinsic evidence. Some positive covenants give rise to the same difficulty. For example, a covenant to keep a flat in good structural and decorative repair by itself tells nothing about any benefited land, except in so far as structural disrepair may physically damage other parts of the building. But even if this is accepted, it is not clear why the prescribed formalities should be more severe than those at present required for negative covenants, which even so are "all too frequently" not employed. Inadvertence is not cured by passing Acts of Parliament. A strict statutory requirement is scarcely less likely to be overlooked than is a less strict requirement derived from case-law. That, at any rate, would seem to be the lesson of the Land Charges Act 1925, as well as of the Statute of Frauds.

It is perhaps for these general reasons that in the current law about the benefit of negative covenants we see the "judicial view" gaining ground at the expense of the "conveyancers' view." Many of the decisions have been excessively technical, and at times the courts have seemed bemused by their refinements. But this is because they have been pressed with subtle arguments prompted by the "conveyancers' view" that the benefited land should be clearly defined in the deed of covenant. Occasionally they have appeared to accept this, and judges and others have slipped into saying that the deed must identify the land.³⁵ But in general they have resisted it.

persons who had an interest in the land, the surface to which the covenant refers, and the covenant touches and concerns the land. The covenant is, therefore, to be deemed to be annexed to the land; the benefit of it runs at law with the land; and the assignee can sue upon it. See *Rogers v. Hosegood*."

³⁵ *Renals v. Cowlshaw* (1879) 11 Ch.D. 866 at p. 868 (James L.J.); *Re Union of London and Smith's Bank Ltd.'s Conveyance* [1933] Ch. 611 at p. 625 (Bennett J.); *Newton Abbot Co-operative Society Ltd. v. Williamson & Treadgold Ltd.* [1952] 1 Ch. 286 at p. 289 (Upjohn J.); (1968) 84 L.Q.R. at p. 24 (P. V. Baker). But these may be merely verbal differences, since very loose expressions may be held to "identify" or "define" the benefited land, as in *Rogers v. Hosegood*, discussed next.

No case shows this more clearly than *Rogers v. Hosegood*,³⁶ approving the classic formula which will annex the benefit effectively. The covenant was there made merely with the vendors "their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the said premises." This is the very opposite of a formula of identification. It is a purely general formula, such as might be incorporated as a clause of common form, or might be deemed to be incorporated by statute. It merely makes it clear that the benefit is intended to run with some land of the vendor, so that the covenant is not merely personal. Where and what the benefited land is can be established only by evidence, just as in cases where the benefit runs at common law. Indeed, Farwell J. at first instance treated the benefit as running at law, and it was only in the Court of Appeal that it transpired that the legal estate was outstanding in a mortgagee, so that it had to run in equity—but under similar rules.

A hardening of the court's attitude may have been signalled by the well known but somewhat cryptic words of Romer L.J. in the *Union Bank* case,³⁷ where he said:

For, although the Court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the Court as to the existence of other lands of the vendor, the extent and situation of which are undefined.

In fact this passage occurs in a statement of the rules for the *assignment* of the benefit of a covenant not annexed to the benefited land in the first place. But in principle there is no reason why the rules for annexation and assignment should differ, so far as regards the identification of the benefited land. In both cases alike the benefited land must be identifiable at the time when the covenant was made, and express assignment with a later conveyance merely supplies the want of a formula of annexation in the original deed. As it is aptly put by Mr. P. V. Baker, "express assignment is delayed annexation."³⁸ On this footing it is plain that Romer L.J.'s rule is, in part at least, fundamentally inconsistent with the classic principle of *Rogers v. Hosegood*. For the words of annexation in that case can with perfect accuracy be described as "vague references in the conveyance . . . as to the existence of other lands of the vendor, the extent and situation of which are undefined." The sole description

³⁶ [1900] 2 Ch. 388.

³⁷ [1933] Ch. 611 at p. 631. This passage contains the same difficulty as that mentioned in n. 41, below.

³⁸ (1968) 84 L.Q.R. at p. 29. See Mr. Hayton's article (n. 77) at p. 567.

of the benefited land was "all or any of their lands adjoining or near to the said premises." Since any benefited land must of necessity be near the burdened land, the classic formula is totally devoid of definitive meaning. It says no more than that the covenant is for the benefit of unspecified land of the vendor, leaving its identification entirely to extrinsic evidence.

Nevertheless, as the law about assignment developed, the profession made a determined attempt to clamp formalism upon it. In the *Union Bank* case at first instance Bennett J. had said that an assignee must be able to satisfy the court that "the deed containing the covenant defines or contains something to define the property for the benefit of which the covenant was entered into."³⁹ When Upjohn J. refused to accept this restriction in the *Newton Abbot* case his decision was criticised in the leading work on covenants⁴⁰ and was attacked at length in the *Law Quarterly Review*.⁴¹ It was objected, fairly enough from the conveyancing standpoint, that a purchaser of the burdened land would be unable to tell whether the covenants might be enforceable against him by some third party, and would be unable to ignore them even if they made no reference to any other land.⁴² But to this it may be answered that a purchaser who has notice of restrictive covenants on the title ought to expect to be bound by them, or at least to be put on inquiry. Where restrictive covenants are taken in a conveyance there is a strong presumption that they are for the benefit of other land and are unlikely to be purely personal, so that the absence of words of annexation is likely to be a mere mistake—as it was, most probably, in the *Newton Abbot* case. It is surely preferable to put the purchaser on inquiry than to destroy a valuable equitable interest in land for purely formal reasons.

In the *Newton Abbot* case⁴³ a lady who carried on an iron-monger's business in property called Devonia sold other property

³⁹ [1933] Ch. 611 at p. 625; see n. 35, above.

⁴⁰ Preston & Newsom, *Restrictive Covenants* (2nd ed., 1955), pp. 402–448. This criticism does not appear in the 4th ed. (1967), p. 32, which accepts the opinion of Wilberforce J.: see below n. 49. The learned author, Mr. G. H. Newsom Q.C., appeared for the plaintiffs in the *Marten* case, thus successfully opposing his own criticism. Another critic is Mr. D. J. Hayton (*post*, n. 77).

⁴¹ Sir Lancelot Elphinstone, "Assignment of the Benefit of Covenants Affecting Land" (1952) 68 L.Q.R. 353. The argument of this article is not easy to follow. Its thesis (at p. 358) seems to be that assignment of the benefit should be allowable only where the identity of the dominant land is shown with reasonable certainty by the instrument creating the covenant. But in that case the benefit would be annexed, and assignment would be unnecessary, except in the rare cases exemplified by *Stilwell v. Blackman* [1968] Ch. 508, as to which see n. 56, below.

⁴² See Sir L. Elphinstone's article (preceding note) at p. 361.

⁴³ *Newton Abbot Co-operative Society Ltd. v. Williamson & Treadgold Ltd.* [1952] Ch. 286.

on the opposite side of the street, subject to a covenant by the purchaser not to use it for the business of an ironmonger. There were no words of annexation. But it was plain from the facts that at least part of the purpose of the covenant was to protect the value of Devonian. Upjohn J. held that the benefit of the covenant passed in equity under the vendor's will to her son as part of her personal estate, so that he was able to assign it effectively along with Devonian on a subsequent sale. Upjohn J. fastened upon Romer L.J.'s words "or have been otherwise shown with reasonable certainty" as entitling him to look at the attendant circumstances; and he found that, in view of the close juxtaposition of the properties, the only reasonable inference was that the benefit of the covenant was to run with Devonian if the covenantee wished so to dispose of it. He proceeded entirely upon extrinsic evidence, just as he might have done in ascertaining the dominant tenement in the case of an easement.

Lord Wilberforce, when a Chancery judge, gave strong support to Upjohn J. in *Marten v. Flight Refuelling Ltd.*,⁴⁴ resisting a powerful attack on him by the then Attorney-General. "What could be more obvious," Wilberforce J. said, "than that the covenant was intended for the protection or benefit of the vendor's property Devonian? To have rejected such a conclusion would, I venture to think, have involved not only an injustice but a departure from common sense."⁴⁵ Likewise availing himself of Romer L.J.'s words "otherwise shown with reasonable certainty," he held that their natural meaning was that evidence from outside the deed was admissible, and that "a broad and reasonable view may be taken as to the proof of the identity of the lands."⁴⁶ He then applied these principles to the case before him, where a farm had been sold out of an agricultural estate which was managed as one unit with a strongly marked agricultural character. The purchaser had covenanted with the vendors not to use the farm for other than agricultural purposes, unless the vendors themselves should dispose of other parts of the estate free from this restriction or should disregard it themselves. On these very simple facts the learned judge held that the covenant was taken for the benefit of the remainder of the vendors' estate. A decision based merely on the wording of the conveyance, he said, would be unduly narrow and technical, and "would go far to undermine the usefulness of the rule which equity courts have evolved that the benefit of restrictive covenants may be capable of passing to assigns of the 'dominant' land or of the covenant in cases other than those of annexation."⁴⁷

⁴⁴ [1962] Ch. 115.

⁴⁶ *Ibid.*, at p. 131. The requisite evidence may, of course, not be forthcoming, as in *Reid v. Bickerstaff* [1909] 2 Ch. 305.

⁴⁵ *Ibid.* at p. 133.

⁴⁷ *Ibid.* at p. 134.

It may be said—and it has been said⁴⁸—that the law has thus come to permit a kind of implied annexation, just as it does with the dominant tenement of an easement. Wilberforce J.'s decision does not quite reach the point of allowing a successor in title to the benefited land to sue without either annexation or assignment, since in fact the plaintiffs in his case were able to sue as original covenantees.⁴⁹ But the whole drive of his reasoning was to establish that surrounding circumstances would by themselves make the benefit "capable of passing to assigns of the 'dominant' land"; and if he had been treating the plaintiffs as original covenantees his careful discussion of the *Union Bank* and *Newton Abbot* cases would have been wholly out of place. He sets out on his analysis on the assumption that he is dealing with a claim by successors in title,⁵⁰ only to observe at the end that he is not doing so, and that "to that important extent the plaintiffs' case is stronger."⁵¹ It is submitted that it is his reasoning that matters, and that it is entirely convincing and correct. If this is so, implied annexation has arrived.⁵²

Implied annexation has in fact long been with us in the law about building schemes. Surrounding circumstances there demand that the benefit should run freely, even in the absence of express annexation or assignment. Here again there must be heavy reliance on extrinsic evidence, since the essentials of a building scheme will normally not be apparent from the deed containing the covenant. In the case of an unregistrable (pre-1926) covenant there may well be nothing to warn a purchaser of the burdened land that there was a building scheme: the covenant merely puts him on inquiry, and he has no right to assume that the covenant will not be enforceable against him by strangers. It is therefore of particular interest that

⁴⁸ M. & W. at p. 765.

⁴⁹ I am grateful to Mr. P. V. Baker for pointing out my mistake in ignoring this point in M. & W. p. 765: see (1968) 84 L.Q.R. at p. 30. But Mr. Baker himself ignores Wilberforce J.'s reasoning, which if accepted carries the case much further than he maintains, and indeed strengthens his own argument. See also Preston & Newsom, *Restrictive Covenants* (4th ed.), p. 32, submitting that "following very full argument expressly addressed to this particular point, the judgment of Wilberforce J. in *Marten's* case is definitive" on the question for which Mr. Baker says it is no authority.

⁵⁰ See esp. at p. 130, lines 3–6, prefacing five pages of discussion of the conditions under which "the benefit of restrictive covenants can pass to persons other than the original covenantee, even in the absence of annexation."

⁵¹ At pp. 134–135.

⁵² Hints to the same effect abound in the reports: see, e.g., Hall V.-C.'s reference in *Renals v. Cowlishaw* (1878) 9 Ch.D. 125 at p. 129 to "the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property." See also Collins L.J. in *Rogers v. Hosegood* [1900] 2 Ch. 388 at p. 408; Vaughan-Williams L.J. in *Formby v. Barker* [1903] 2 Ch. 539 at p. 550; and cf. Harman L.J. in *Radstock Co-operative and Industrial Society Ltd. v. Norton-Radstock U.D.C.* [1968] Ch. 605, at pp. 627–628: "the covenant cannot be enforced, in my opinion, as a restrictive covenant, not being annexed to any particular land of the lessor either expressly or by implication." (*Italics supplied.*)

in a recent case Stamp J. has pointed out how the building scheme rules (which he took the opportunity of relaxing) are merely one application of the general principle that surrounding circumstances, if sufficiently strong, are themselves enough to make the benefit run.⁵³

These decisions show how the "judicial view"—the "broad and reasonable view" of Wilberforce J.—is prevailing over the "conveyancers' view" with its preference for technicality and formalism. The court is at last assimilating the rules for covenants running in equity with the rules for covenants running at law and for easements. Once again, equity is following the law. Jessel M.R.'s percipient words comparing restrictive covenants with easements⁵⁴ have often been quoted, but in practice their implications were disregarded by almost all the authorities, until Mr. P. V. Baker's enlightened and enlightening article appeared. After referring to Jessel M.R.'s statements of principle Mr. Baker says: "From the principles outlined above, and especially from the analogy of easements, we should expect the right to go along automatically with the benefited or dominant land. . . ." ⁵⁵ This is the desirable result towards which the "broad and reasonable view" is now leading. It is surely time for the law to acknowledge that covenants taken on a sale of the freehold are in the vast majority of cases intended to benefit other land of the vendor, and that, provided only that such land exists, the benefit should run with it, and with any appropriate part of it,⁵⁶ as a matter of course. Covenants in conveyances have for too long been judicially regarded as a peculiar species of personal contract, to be allowed to run only in special circumstances. In reality they are genuine proprietary interests; and so long as they are accepted as socially desirable, the policy of the law should be to facilitate their transmission. Otherwise there will be too many cases of what Wilberforce J. called "not only an injustice but a departure from common sense."

Returning now to the Wilberforce Report, we see a sharp conflict between the judicial policy in the cases just discussed and the

⁵³ *Re Dolphin's Conveyance* (above, n. 13). See similarly *Collins L.J.* in *Rogers v. Hosegood* (above, n. 52); *M. & W.*, p. 766.

⁵⁴ *London and South Western Rly. v. Gomm* (1882) 20 Ch.D. 562 at p. 583.

⁵⁵ *The Benefit of Restrictive Covenants* (1968) 84 L.Q.R. 22 at p. 29. See similarly Mr. Hayton's article (*post*, n. 77) at p. 543.

⁵⁶ For the problem of the part and the whole, in which the decisions have attained a more than Aristotelian abstraction, see the valuable discussion in Mr. Baker's article (preceding note). Even in this welter of unnecessary technicality, however, the tide is running in favour of successors in title to the benefit. *Stilwell v. Blackman* [1968] Ch. 508 at least allows assignment of the benefit with part of the benefited land, even though the benefit has previously been annexed to the whole of it only. But the restrictive notion of annexation to the whole and not to the component parts is justly criticised by Mr. Baker. It appears to have been invented by Clauson J. in *Re Ballard's Conveyance* [1937] Ch. 473, without it having occurred to counsel: Preston & Newsom, *Restrictive Covenants* (4th ed.), preface.

policy of the Report, which recommends that no covenant should run unless some specified words such as "covenant *in rem*" are used and both the land burdened and the land benefited are plainly identified in the deed either by plan or by adequate description.⁵⁷ The Committee's policy would certainly simplify life in Lincoln's Inn. But equally certainly it would lead to many cases in which, contrary to justice and common sense, covenants would fail for omitting to conform to these stringent formalities. History teaches that judges dislike enforcing such laws, and will drive coaches and horses through them if necessary. They rendered the Statute of Frauds tolerable by inventing a wide exception to it in the doctrine of part performance and by evading its requirements by much subtle case-law. Sometimes they succeed in rendering the Land Charges Act 1925 tolerable by doing violence to its language; but sometimes it obliges them to accept injustice. A recent case on that Act showed that its basic definitions of transactions are still completely obscure after nearly fifty years, and that restrictive covenants which in justice and common sense ought obviously to have been enforceable have to be held ineffective for the purely formal reason of their non-registration.⁵⁸ These are the fruits of the "conveyancers' view." If the beneficiaries of covenants are still failing to register them after nearly half a century, is it to be supposed that the imposition of further compulsory formalities will be to the general advantage? There will of course be cases where the facts are obscure. But there will be many others, probably the great majority, where they are as obvious as they were in the *Newton Abbot* and *Marten* cases. Absolute certainty can be bought only at a price, and surely the price in this case will be too high.

What is wrong with Section 78?

The informal annexation of the benefit of a covenant, which judges are now encouraging, might be greatly assisted by invoking section 78 of the Law of Property Act 1925, formerly section 58 of the Conveyancing and Law of Property Act 1881. Why the decided cases make no reference to this legislation is a mystery. It seems to be assumed that it is inapplicable, but such reasons as can be found for this assumption are far from convincing. Section 78 (1) provides:

A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in

⁵⁷ See above, n. 24.

⁵⁸ *Shiloh Spinners Ltd. v. Harding* [1971] 3 W.L.R. 34. This case makes one think that the defects of the Land Charges Act 1925 were understated in the article referred to in n. 20, above.

title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

For the purposes of this subsection in connexion with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

This is a typical "word-saving" provision, by which words of common form are deemed to be included—though strangely, and in contrast to section 79 which dates only from 1925, nothing is said about contrary intention.⁵⁹ Read literally, the words deemed to be included are nonsense; for it is legally impossible to covenant with successors in title as yet unascertained.⁶⁰ But conveyancers used them, inept though they were, in order to indicate that the benefit of the covenant was not merely personal but was intended to pass to the covenantee's successors in title—and plainly these words in the Act mean the successors in title to the "land of the covenantee" to which the covenant relates. The section does not say "*expressed* to relate to *some* land of the covenantee": it says "relating to any land of the covenantee," meaning presumably that the relation between the covenant and the covenantee's land is a fact which may be proved in any manner, *i.e.*, by extrinsic evidence.⁶¹ If the covenant in fact relates to any land of the covenantee, his successors in title, widely defined for the purposes of restrictive covenants, are presumed to be intended to benefit.

The words "relating to" land, like "having reference to" land elsewhere in the legislation of 1925,⁶² may be taken as synonymous with the time-honoured phrase "touching and concerning" land, familiar in the law of covenants for nearly four hundred years. Whether a covenant is *capable* of touching and concerning land is an objective matter of law, independent of the intention of the parties.⁶³ Whether, if so capable, it actually does relate to any

⁵⁹ Early editions of Hood & Challis, *Conveyancing & Settled Land Acts* (e.g., 3rd ed., 1889, p. 135) say that it would be absurd if the provision (then in its 1881 form) were not subject to contrary intention. This seems obvious. But why then was the mistake not rectified in the 1925 version, so as to agree with s. 79 which was added in 1925? The point is ignored in Hood & Challis, *Property Acts* (8th ed., 1932), p. 165, and in Wolstenholme & Cherry, *Conveyancing Statutes* (12th ed., 1932), pp. 358–359.

⁶⁰ *Forster v. Elvet Colliery Co. Ltd.*, [1908] 1 K.B. 629 (affirmed as *Dyson v. Forster* [1909] A.C. 98); *Westhoughton U.D.C. v. Wigan Coal & Iron Co. Ltd.* [1919] 1 Ch. 159; *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430.

⁶¹ See the *Forster* case (preceding note), a decision on the version of 1881.

⁶² Law of Property Act 1925, ss. 141, 142.

⁶³ *Spencer's Case* (1583) 5 Co.Rep. 16a; the *Forster* case (n. 60, above). This is an essential condition for the running of the benefit with land, whether freehold or leasehold: *Rogers v. Hosegood* [1900] 2 Ch. 388 at p. 395. The expression must be used in some different sense in *Dartstone Ltd. v. Cleveland*

given land is a matter of intention, to be collected from the deed and the surrounding circumstances: there are no rules of formality.

Why then should the benefit of the covenant not run with the land to which it can be shown to relate? If the statutory words had been set out in the deed, they would have provided a formula no less (though no more) definitive than that which worked an effective annexation in *Rogers v. Hosegood*.⁶⁴ That formula, as already pointed out, is entirely void of identificatory meaning and amounts to no more than a vague reference to all or any of the covenantee's nearby land. What could be more reasonable than to incorporate the equivalent of this general formula automatically in every case where there was benefited land? Why then was Dr. Radcliffe not right in suggesting that this was the "most natural" effect of the section?⁶⁵ And why, most of all, should counsel never argue the point, judges never mention it, and textbooks not discuss it?⁶⁶

The professional silence seems all the more deafening in the light of the earlier version of 1881. As every law student knows, the stock example of how *not* to annex the benefit comes from *Renals v. Cowlishaw*,⁶⁷ where the covenant was made with the vendors, "their heirs, executors, administrators, and assigns." This left it quite obscure whether the covenant was intended to benefit the successors to the covenantee's land or the successors to his personalty, since at that date freehold land could not vest in executors or administrators. Two years after this decision came the Conveyancing Act 1881, which by section 58⁶⁸ provided:

- (1) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.
- (2) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

Surely it was as plain as words could make it that this enactment, with its careful differentiation of realty and personalty, was designed

Petroleum Co. Ltd. [1969] 1 W.L.R. 1807, where Pennycuik J. held that a covenant did not touch or concern the benefited land but nevertheless ran with it.

⁶⁴ Above, n. 36.

⁶⁵ *Some Problems of the Law Relating to Restrictive Covenants* (1941) 57 L.Q.R. 203 at p. 205.

⁶⁶ Preston & Newsom, *Restrictive Covenants* (4th ed., 1967), do not mention the question. All the decided cases are silent, even those where the statute would seem most apposite, e.g., *Shayler v. Woolf* [1946] Ch. 320.

⁶⁷ (1878) L.R. 9 Ch.D. 125; (1879) L.R. 11 Ch.D. 866.

⁶⁸ The sidenotes of ss. 58 and 59 were accidentally transposed.

to unscramble muddled descriptions of successors such as that which had just previously led to disaster in *Renals v. Cowlishaw*. Instead of leaving the successors at the mercy of the precise technical words used in earlier transactions, the Act more sensibly anchored their rights to the objective facts: if in fact the covenant benefited land of the covenantee, it should be presumed to be intended to run with it.

The differentiation of successors become meaningless after 1925, so that the present section 78 naturally assumed its simpler form as set out above. The additional words which define "successors in title" widely are evidently intended to have the same effect as "their heirs and assigns and others claiming under them" in *Rogers v. Hosegood*, and to make it clear that equity did not follow the law (or what was supposed to be the law⁶⁹) in requiring the successor to hold the same estate in the benefited land as the original covenantee. Both Professor Bailey⁷⁰ and Dr. Radcliffe⁷¹ thought that the 1925 version had (in Professor Bailey's words) "a more hopeful appearance than its predecessor," since it was now clear that successors in title meant successors in title to the benefited land only. They both thought that the 1881 version was ambiguous in that "assigns" might mean either assigns of the land or assigns of the benefit of the covenant as an independent chose in action. With all respect, this seems a hostile interpretation, since the natural meaning of "heirs and assigns" in a pre-1926 provision about a covenant "relating to the land" (*sc.* of the covenantee⁷²) was surely the successors in title to the land in question, whether by inheritance (heirs) or by purchase (assigns). "Assigns" is plainly limited by its association with "heirs," as well as by the sense generally. Decisions in which the word "assigns" in a covenant have been treated as ambiguous⁷³ are not to the point, since they do not have the controlling context found in the Act. Since Parliamentary records are lacking,⁷⁴ it is not possible to discover from the legislative history whether the 1881 version was designed to remedy the mistake made in *Renals v. Cowlishaw*. Evidently the enactment was viewed with disfavour by a profession desirous of imposing

⁶⁹ In *The Prior's Case* (n. 31, above), as related in *Spencer's Case* (n. 63, above), the covenantee was tenant in fee simple but his successor, the successful plaintiff, was tenant in tail. The supposed restriction was held to have been removed by s. 78: *Smith v. River Douglas Catchment Board* [1949] 2 K.B. 500—a much more daring interpretation of the section than that advocated here.

⁷⁰ (1938) 6 C.L.J. at p. 354.

⁷¹ (1941) 57 L.Q.R. at p. 204 (misquoting s. 58 of the Act of 1881 as s. 53).

⁷² These words were inserted in the version of 1925.

⁷³ *Rogers v. Hosegood* [1900] 2 Ch. 388 at p. 396; so interpreting *Renals v. Cowlishaw* (n. 67, above).

⁷⁴ S. 58 (as it became) was inserted by amendment in the House of Lords in Committee of the Whole House on 9 March 1880: *Lords Journals*, Vol. cxii, p. 71; but no record was made. I am indebted to the Clerk of the Records, House of Lords, for confirming this last fact.

stricter verbal formalities,⁷⁵ and an ambiguity was found where none really existed. Nevertheless it seems extraordinary that, so far as the reports show, neither the 1881 nor the 1925 versions have even been invoked in argument in situations which in all probability are precisely those for which they were designed.

Hardly less surprising is the absence of any attempt to invoke section 62 of the Law of Property Act 1925, which passes to a purchaser all "rights and advantages whatsoever . . . enjoyed with . . . the land . . ." Why should this not pass the benefit of a covenant which is in fact intended to benefit the land conveyed? Although the court might interpret the section restrictively in a number of ways, it has in fact interpreted it with notable freedom in other situations.⁷⁶ Once it is admitted that restrictive covenants are first and foremost interests in land, there is at least some strength in the contention, recently put forward,⁷⁷ that they should fall within section 62, even though historically they lay outside the family of legal interests which "lay in grant" and for which section 62 was designed.

All these arguments, it will be observed, arrive at the same conclusion as does the reasoning of Wilberforce J. in the *Marten* case: if it is plain from the situation in which a covenant was taken that the benefit was intended to adhere to land of the covenantee, and if it is capable of doing so, that is enough to make it run. Wilberforce J.'s "broad and reasonable view" ought to have been in operation for the past ninety years, by force of statute, thereby saving much doubt and difficulty. It is submitted that this is in any case the right policy for the law to follow; and that, when legislation gives effect to the Wilberforce Report, care should be taken to avoid any view which is not both broad and reasonable.

⁷⁵ The first three editions of Hood & Challis, *Conveyancing & Settled Land Acts*, say that the section appears to be founded upon some misapprehension. This disparaging remark was dropped in the 4th ed. (1895).

⁷⁶ *E.g. Goldberg v. Edwards* [1950] Ch. 247.

⁷⁷ D. J. Hayton, *Restrictive Covenants as Property Interests* (1971) 87 L.Q.R. 539 at p. 570.

“AS A MATTER OF FACT . . .”

F. J. ODGERS

I

“Now what I want is Facts. . . . Facts alone are wanted in life. Plant nothing else, and root out everything else. . . . Stick to facts, Sir!” Dickens’s Mr. Gradgrind was, perhaps, a county court judge *manqué*. There is a clear echo of his voice in a story told—and told superbly—by Mr. Justice Mars-Jones of a judge in a rural county court who found himself bemused by a claim to an easement based on the doctrine of lost modern grant. “What’s that? What’s that?” he declaimed. “A lost grant? That’s a very serious matter! Who lost it, and when? Was it your instructing solicitors? Let me see the affidavit of documents. . . .” And, on being assured that “lost grant” was a matter of legal fiction, demurred with vigour. “Fiction, is it? *Fiction*? It’s not fictions we want in this court, it’s facts!” Whether he had Thomas Gradgrind in mind or not, His Honour was among the prophets, for over the last fifty years facts have largely replaced fictions and, in the law of tort in particular, dogmatic rules of lawyers’ law, most of them prohibitory, have been rooted out. It is true that some old plantings survive, and that some strange and undesired off-shoots have appeared, but in general the process has been successful. It has certainly been welcomed by all save a few ageing academics who year by year have lamented the disappearance of much long-cherished and well-cultivated material. It is the removal of the law’s negatives, leaving liability in an increasing number of cases to be determined as an issue of fact, that is perhaps the outstanding development in the law of tort since 1921.

If a single case had to be chosen as “epoch making” it would have to be *Donoghue v. Stevenson*¹ and the Law Reform (Contributory Negligence) Act, 1945, would no doubt claim first place among the statutes. But the general shift away from dogmatic propositions of law has been, it is submitted, the great achievement of the half-century; and both *Donoghue v. Stevenson* and the Act of 1945 take their places as incidents only in the wider process of law reform, accomplished partly by legislation and partly by the efforts of the more adventuresome among the judges.

¹ [1932] A.C. 562.

II

NOTORIOUS NEGATIVES

If we turn back to the early years of the *Cambridge Law Journal* we find an intimidating array of denials, regularly disparaged by judges and commentators, bewildering and dismaying to the lay client, but distressingly effective none the less.

Where a tortfeasor, who had caused his victim the gravest personal injuries, died before judgment, the plaintiff had to be told that he could not claim a penny from the deceased's estate, however substantial it might be or however handsomely the risk might be covered by insurance.² If he asked why not, he would be met, in the fashion of the day, by a well-known example of a despairing device—the translating of the proposition into indifferent Latin and the declaiming of the result loudly in the old pronunciation.³ "*Actio personalis moritur cum persona.*" There it was. The origins of the rule might be obscure; its scope might be uncertain; Sir John Salmond could write that it was destitute of any rational basis⁴—but the victim could not sue. Facts, merits, availability of funds to meet a judgment, all were irrelevant. The law said "no"⁵ and continued to say "no" until 1934.⁶

If a successful plaintiff obtained judgment against a wrongdoer who was unable to satisfy it, he had no recourse against any other tortfeasor when the liability was "joint." Why not? Because in that heyday of rules, the Rule in *Brinsmead v. Harrison*⁷ said "no," "on the ground that *transit in rem judicatam* or upon the general principle . . . '*Interest reipublicae ut sit finis litium*'" which was enough to confound any questioner. If, on the other hand, one of joint wrongdoers was compelled to pay the whole of a judgment he had no claim to contribution from his fellow wrongdoers, however culpable, for another rule, the Rule in *Merryweather v. Nixan*⁸ said "no." Why? Because in 1799 Lord Kenyon C.J. had "never before heard of such an action having been brought." Lord Herschell might later describe it as unfounded "on any

² Compulsory third-party insurance for motorists was introduced in 1930, but where the defendant killed himself in the accident or died before judgment the plaintiff was deprived of all benefit until the abolition of the rule in 1934. Cmd. 4540 (March 1934), para. 5.

³ "The decent obscurity of a learned language" had uses other than Gibbon's, despite Lord Shaw's *dictum* that the day for canonising Latin phrases had gone past. (*Ballard v. North British Railway Co.*, 1923 S.C.(H.L.) 43, 56.)

⁴ Salmond, *Torts*, 6th ed. (1924), p. 78.

⁵ Claims for wrongful appropriation of property and actions for injury to real or personal estate survived in some circumstances. (*Phillips v. Homfray* (1883) 24 Ch.D. 439; Administration of Estates Act 1925, s. 26.)

⁶ Law Reform (Miscellaneous Provisions) Act 1934.

⁷ (1872) L.R. 7 C.P. 547.

⁸ (1799) 8 T.R. 186.

principle of justice or equity or even public policy”⁹ but both rules were too firmly established to be questioned and they survived until 1935.¹⁰

If a husband wished, on ordinary principles of the law, to deny his liability for a tort committed in his absence and without his concurrence by his wife who was not his servant, he had to be told that he had no hope at all. As husband he was liable for his wife's torts. This may have been no more than the effect of an outdated procedural rule arising from the fiction of unity of husband and wife but it had survived the Married Women's Property Act 1882, and flourished until 1935, despite emphatic dissent by Fletcher Moulton L.J.¹¹ and by Lords Birkenhead and Cave,¹² for that Act was “not a Married Man's Relief Act.”¹³ On the other hand, if he were a husband suffering grievously from a tort committed against him by his wife, his position was just as hopeless. There were no circumstances in which he could sue her in tort—one of the rare rules of English law to which there was no exception. And to a wife, complaining of a tort by her husband, the answer was: “You can sue to protect and secure your separate property but not otherwise.”¹⁴ A wife might have some comfort under the criminal law or in the matrimonial courts but she could not sue in tort a husband who kicked her in the teeth unless they were false teeth and her separate property. She could sue him if he improperly sold her grand piano or slashed her prized portrait of her mother, but not if he libelled her¹⁵ or locked her in the cellar for the night.¹⁶ It may be that not many spouses were directly worried by all this but right up to 1962¹⁷ the rules had some strange effects particularly on the rights to contribution among tortfeasors and their insurers.¹⁸

⁹ [1894] A.C. 324.

¹⁰ Law Reform (Married Women and Tortfeasors) Act 1935.

¹¹ *Cuenod v. Leslie* [1909] 1 K.B. 880, 889.

¹² *Edwards v. Porter* [1925] A.C. 1, 6.

¹³ *Ibid.*, p. 38, Lord Sumner. In 1933, Swift J. had occasion to point out: “... this Gilbertian situation: a woman who is sued because it is said she has seduced another woman's husband; if she has done that in fact she has done her husband the greatest wrong that a wife can possibly do . . . but, according to our law, he has to pay for that—he has to pay!” (*Newton v. Hardy* (1933) 149 L.T. 165, 166.) Fortunately the action against the allegedly enticing wife failed on the facts.

¹⁴ Married Women's Property Act 1882, s. 12.

¹⁵ Unless, perhaps, the libel affected her character or credit in her trade. An imputation of unchastity to a wife who was a garage proprietor was held insufficient in 1929 as “it cannot be said that chastity is a necessary qualification for the management or ownership of a garage,” per Macnaghten J., *Ralston v. Ralston* [1930] 2 K.B. 238, 245.

¹⁶ *Tinkley v. Tinkley* (1909) 25 T.L.R. 264; *Hulton v. Hulton* [1917] 1 K.B. 813; *Larner v. Larner* [1905] 2 K.B. 539.

¹⁷ Law Reform (Husband and Wife) Act 1962.

¹⁸ See *Chant v. Read* [1939] 2 K.B. 346; *Drinkwater v. Kimber* [1952] 2 Q.B. 281; *Mallett v. Dunn* [1949] 2 K.B. 180; *Broom v. Morgan* [1953] 1 Q.B. 597.

Where a plaintiff was injured by the servants or agents of the Crown, fiction and dogma were triumphant. He could not sue the Crown in tort.¹⁹ He might sue an individual servant of the Crown and, for a time, a person nominated by the Crown, but he could not sue the Crown until 1947.²⁰

If a servant was injured by the negligence of a fellow-servant in common employment with him, he could not sue his master, despite the normal principles of vicarious liability. He was met by one of the most deplorable of all fictions, the doctrine of common employment.²¹ "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase," and it flowered until 1948.²² The servant would be told, to his blank amazement, that when he and his fellow-workmen engaged to serve the master in a common work, they knew or ought to have known the risks to which they were exposing themselves; they were presumed to have contracted with reference to them and the presumption was one of law.²³ There was a limited right to sue for a limited sum under the Employers' Liability Act 1880, but this was restricted to railway servants and persons engaged in manual labour other than domestic or menial servants. There could be a claim to workmen's compensation under the Act of 1925 but the sums recoverable were small even on the standards of those days. In general the doctrine of common employment worked harshly and led to evasions based on the extension of the master's liability for his own negligence. "If there is anything worse than open injustice it must be capricious injustice. Common employment suffered this ultimate degradation when its application came to depend upon such distinctions as that between collisions of tramcars and collisions of buses."²⁴

If a citizen sustained grievous personal injury by falling in the dark into a hole in the highway allowed to develop because of the highway authority's failure to repair, he would have met yet another firm "no." *Russell v. Men of Devon*,²⁵ decided in the days when the duty to repair was on the inhabitants of the parish, had ruled that no action, as distinct from indictment, would lie—"it is better that an individual should sustain an injury than that the public should suffer an inconvenience." And the exemption con-

¹⁹ *Tobin v. The Queen* (1864) 16 C.B.(N.S.) 310.

²⁰ For an erudite and entertaining exposition of the rule, see Stephen Chapman (now Mr. Justice Chapman), *Statutes on the Law of Torts*, pp. 382-385; Crown Proceedings Act 1947.

²¹ *Priestly v. Fowler* (1837) 3 M. & W. 1; *Hutchinson v. York & Newcastle Ry.* (1850) 5 Ex. 343.

²² Law Reform (Personal Injuries) Act 1948.

²³ *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 266, per Lord Cranworth at p. 295.

²⁴ *Unger* (1949) 12 M.L.R. 347.

²⁵ (1788) 2 T.R. 667.

tinued until 1964²⁶ even after the liability had been transferred to a corporate local authority and the procedural difficulty arising from a multiplicity of defendants had been removed.²⁷

III

NO-DUTY CASES

Quite apart from the prohibitory rules there was a formidable list of immunities, provided by the law, from liability for failure to take reasonable care, even though it caused foreseeable injury to a plaintiff.²⁸ A victim was told he could not sue because he was owed no legal duty to take care by the defendant. Why, he might ask, was there no duty in his particular case? And the answer was: "whether there is such a duty in particular circumstances, and how far it goes, are questions of law."²⁹ If the law, at a high enough level, had said there was no duty there was nothing to be done about it.

A plaintiff who complained of injury caused to him by the undisputed carelessness of a defendant in the performance of his contract with a third party, at any rate in relation to chattels and premises, found himself, until 1932,³⁰ faced with the shocked denials of *Winterbottom v. Wright*,³¹ *Earl v. Lubbock*³² and *Cavalier v. Pope*.³³ What had happened to the plaintiff? Had he not been lamed for life when the coach he was driving gave way and broke down, being in a "frail, weak and infirm, and dangerous state and condition" because the defendant had failed to maintain it? Yes, but was not the defendant's duty under a contract with the Postmaster-General alone? "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract—if we go one step beyond that, there is no reason why we should not go fifty."³⁴ So a firm "no" to the victim, with a dash of sympathy and a splash of Latin: "This is

²⁶ Highways (Miscellaneous Provisions) Act 1961, s. 1—not in force until 1964.

²⁷ *Cowley v. Newmarket Local Board* [1892] A.C. 345.

²⁸ In 1967, Professor Millner, with his usual felicity, could still write of this "survival of fossils": "certain immunities are due to the petrification of rules of non-liability originating in very different social conditions and before the negligence concept had gained stature. These now constitute irrational deviations from the law, out of harmony with contemporary requirements." (Millner, *Negligence in Modern Law*, p. 45.)

²⁹ *Butler v. Fife Coal Co. Ltd.* [1912] A.C. 149, 159.

³⁰ *Donoghue v. Stevenson* [1932] A.C. 562.

³¹ (1842) 10 M. & W. 109.

³² [1905] 1 K.B. 253.

³³ [1905] A.C. 428.

³⁴ (1842) 10 M. & W. 109, *per* Alderson B. at p. 115. This fear of "chain reaction or infinity of claims" is found today in the economic loss cases; see C. R. Symmons, "The Duty of Care in Negligence" (1971) 34 M.L.R. 394, 402.

one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*; it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law."³⁵ And so too in 1904.³⁶ *Winterbottom v. Wright* had "stood the test of repeated discussion" for over sixty years: further argument was a waste of time.³⁷ This privity-of-contract doctrine "received its quietus by the decision of the House of Lords in *Donoghue v. Stevenson*"³⁸ but a relic of it even now persists in relation to the sale or letting of premises.

Purchasers and tenants of premises, and their families, guests and visitors, who were injured by collapsing floorboards, unregulated gas boilers, falling ceilings, defective geysers or open-ended gas pipes were greeted with derision and the classic incantation "fraud apart, there is no law against letting a tumbledown house."³⁹ This vendor's and lessor's immunity survived *Donoghue v. Stevenson* in 1932: "the concept of negligence as a separate cause of action developed too late to avoid certain anomalies. The flood it begot submerged parts of the older law but it had to eddy round and leave intact other parts that derived from the forms of action and the notions of an earlier age."⁴⁰ In 1963 the immunity was said to be too deeply imbedded in the common law to be capable of disturbance by a court of first instance⁴¹ and in 1970 it was thought unlikely to be abolished by judicial decision below the House of Lords.⁴² Its removal by statute has been recommended.⁴³

And there were other no-duty cases. A victim who complained of pecuniary loss sustained as a result of a careless, as distinct from fraudulent, misstatement was confronted up to 1964 with an emphatic "no" under the so-called rule in *Derry v. Peek*⁴⁴ unless he could pray in aid statute, contract or fiduciary relationship.⁴⁵

³⁵ *Ibid.*, p. 116, *per* Rolfe B. ³⁶ *Earl v. Lubbock* [1905] 1 K.B. 253, 255.

³⁷ "The result of the rule established by *Earl v. Lubbock* is sufficiently remarkable—namely, the total denial of any legal redress to him who is injured by using a chattel in reliance on the due and careful performance of a contract between the person from whom he received it and some third person." (Salmond, *Torts*, 6th ed. (1924), p. 466.)

³⁸ *Per* Denning L.J. in *Greene v. Chelsea B.C.* [1954] 2 Q.B. 127.

³⁹ *Robbins v. Jones* (1863) 15 C.B.(N.S.) 221; *Cavaller v. Pope* [1905] A.C. 428; *Bottomley v. Bannister* [1932] 1 K.B. 458; *Otto v. Bolton & Norris* [1936] 2 K.B. 46; *Davis v. Foots* [1940] 1 K.B. 116; *Travers v. Gloucester Corpn.* [1947] K.B. 71.

⁴⁰ *Per* Lord McDermott C.J. in *Gallagher v. McDowell Ltd.*, 1961 N.I. 26, 32.

⁴¹ *Per* Nield J. in *Sharpe v. E. T. Sweeting & Son Ltd.* [1963] 1 W.L.R. 665, 674.

⁴² Law.Com. No. 40 (Dec. 1970), para. 44. Although it has been firmly rejected by Lord Denning M.R. and Sachs L.J. in *Dutton v. Bognor Regis U.D.C.* [1972] 2 W.L.R. 299, 308–311, 316–317.

⁴³ *Ibid.*, see *infra*, p. 187.

⁴⁴ (1889) 14 App.Cas. 337; *Le Lievre v. Gould* [1893] 1 Q.B. 491; and cases down to *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164.

⁴⁵ Companies Act 1948, s. 43; *Nocton v. Lord Ashburton* [1914] A.C. 932.

Lord Denning stood firmly against the rule as presented in 1951 and resoundingly rejected the argument of novelty by recalling the "emphatic answer given by Pratt C.J. nearly two hundred years ago in *Chapman v. Pickersgill* when he said: 'I wish never to hear the objection again. This action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief.'"⁴⁶ But he was not vindicated until *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* in 1964.⁴⁷

If a visitor was injured because of a defect in a defendant's premises his innocent efforts to start by showing that the defendant must have foreseen the injury and had in fact failed to take reasonable care were rudely halted. Rules of lawyers' law had first to be applied. Had he entered under this sort of contract, or that sort of contract, or as what the law was pleased to call an "invitee" or merely as a "licensee?" His legal category had to be determined first, for the duty owed by the defendant varied with the label affixed to the plaintiff. There was, inevitably, a rule—the Rule in *Indermaur v. Dames*⁴⁸—but what it meant and when it applied were matters of argument and the Law Reports were strewn with 'occupiers' cases until 1958.⁴⁹ "Into this labyrinth a writer is bound to enter, but he does so with fear and trembling" wrote Sir John Salmond in 1923.⁵⁰ A trespasser was, of course, someone to be rebuked in all cases and rejected in most. Even in 1972 his plight remains distressing.⁵¹

If a motorist had his car overturned by a sheep or other domestic animal jumping from the defendant's field on to the highway, he would be told he had no remedy.⁵² In ordinary circumstances it was no breach of duty not to prevent harmless domesticated animals from straying on to the highway. Had the plaintiff been injured by a barrel rolling from the defendant's premises then not only would there have been no bar to his action but he would have been half-way home under the maxim *res ipsa loquitur*.⁵³ And there

⁴⁶ [1951] 2 K.B. 164, 178.

⁴⁷ [1964] A.C. 465; but see *Mutual Life & Citizen's Assurance Co. Ltd. v. Evatt* [1971] 2 W.L.R. 23.

⁴⁸ (1866) L.R. 1 C.P. 274; 2 C.P. 311.

⁴⁹ Occupiers' Liability Act 1957. Lord Denning had laboured mightily to rationalise the rules before the Act: see, e.g., *Hawkins v. Coulsdon & Purley U.D.C.* [1954] 1 Q.B. 319; *Greene v. Chelsea B.C.* [1954] 2 Q.B. 127; *Dunster v. Abbott* [1954] 1 W.L.R. 58.

⁵⁰ Salmond, *Torts*, 6th ed. (1924) Preface, p. ix. If excuse is necessary for more than one reference to this edition, the writer of this note takes leave to mention that it was the current edition when he began to read about the law.

⁵¹ *Infra*, p. 187.

⁵² *Heath's Garages Ltd. v. Hodges* [1916] 2 K.B. 370; and down through a series of decisions to *Searle v. Wallbank* [1947] A.C. 341; *Brock v. Richards* [1951] 1 K.B. 529; *Ellis v. Johnstone* [1963] 2 Q.B. 8.

⁵³ *Byrne v. Boadle* (1863) 2 H. & C. 722.

could have been liability for an escaping child.⁵⁴ But a sheep, a horse, a cow, a dog? No: historically there had been no such duty of care and nothing had been "established which would tend to show that farmers and others at some uncertain date in our life-time became subject for the first time to an onerous and undefined duty to cyclists and motorists and others which never previously existed."⁵⁵ Or, as Cornford had it, "Every . . . action which is not customary, either is wrong, or if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time."⁵⁶ And so it was until October 1971.⁵⁷

IV

ALL OR NOTHING

A victim of negligence, particularly in the commonest of all tort cases, the running-down action, would find himself, until 1945, confronted with the common law doctrine of contributory negligence. He would hear talk of poles across the street, of tethered donkeys, of over-loaded trucks demolishing bridges, of merchant ships that failed to whistle, of destroyers that went too fast, and of electric trains starting out with neglected brakes. There was the Rule in *Davies v. Mann*,⁵⁸ the doctrine of the last opportunity or last clear chance, and the gloss: "a last opportunity which the defendant would have had but for his own negligence was equivalent in law to one which he actually had," which was one way of stating yet another rule—the Rule in *British Columbia Electric Railway Co. v. Loach*.⁵⁹ Whatever it all meant one thing was clear: there could be no apportionment; it was all or nothing for the plaintiff and a natural desire to avoid giving him nothing resulted in tortuous devices under which he was not infrequently allowed to recover everything despite his own carelessness. "Causal analysis . . . merely succeeded in reducing the law of contributory negligence to a morass of subtleties and casuistry which was the despair of the judiciary."⁶⁰ Sir John Salmond, in 1923, had little use for it all: "Another fundamental question which is still unsettled is that of the true nature of the rule as to contributory negligence. No more baffling and elusive problem exists in the law of torts. . . . An

⁵⁴ *Carmarthenshire C.C. v. Lewis* [1955] A.C. 549.

⁵⁵ *Searle v. Wallbank* [1947] A.C. 341, *per* Viscount Maugham.

⁵⁶ *Microcosmographia Academica*, p. 15.

⁵⁷ Animals Act 1971, s. 8. Brave efforts to avoid the rigidity of the rule had been made by the Court of Appeal in *Deen v. Davies* [1935] 2 K.B. 282, by Denning L.J. dissenting in *Wright v. Callwood* [1950] 2 K.B. 515, and most enterprisingly by Bridge J. in *Bativala v. West* [1970] 1 Q.B. 716.

⁵⁸ (1842) 10 M. & W. 546.

⁵⁹ [1916] 1 A.C. 719.

⁶⁰ Millner, *Negligence in Modern Law*, p. 115.

endeavour to solve the difficulties inherent in this problem leads to the conclusion that the common law rule of contributory negligence is essentially unsound. . . . It would seem that the only satisfactory rule is that . . . of dividing the loss between the persons who were responsible for it, either equally or in proportion to the degree of their fault.”⁶¹ It was over twenty years before this comment was vindicated by statute—the Law Reform (Contributory Negligence) Act 1945, putting an end to the existing state of affairs by providing: “Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.”

Apportionment was in, but academics reacted with caution to the Act of 1945. In 1945 Professor Winfield was writing: “The Act . . . does not alter the existing law as to determining whether or not there has been contributory negligence; all that it does is to alter the law as to the damages recoverable where contributory negligence is established.”⁶² And Dr. Stallybrass was observing that the Act “leaves unaffected as a matter of law what has been somewhat inaptly called the ‘last opportunity rule.’”⁶³ Had these no doubt impeccable propositions of law been accepted and pushed to their logical conclusion in practice the result would have been deplorable. The court would have been concerned to find whether, on all the old “elaborate sophistries,”⁶⁴ the plaintiff would have succeeded or failed. If he would have succeeded he would still recover in full; only if he would have failed, would he receive reduced damages. Dr. Stallybrass, however, prophesied accurately: “The result . . . will in all probability be that the Courts will tend to divide the loss in all cases where some degree of negligence can be attributed to both parties, even though in strictness the accident was wholly caused (at law) by the one who might have avoided the consequence of the other’s negligence.”⁶⁵ Fortunately for the sanity of everyone this view prevailed in practice. In 1947 the then Mr. Justice Denning was able to say in a book review⁶⁶ “The effect in practice is that the doctrine of ‘last opportunity’ has largely disappeared. The courts are no longer pressed to select, from various

⁶¹ Salmond, *Torts*, 6th ed. (1924), Preface, p. viii.

⁶² Winfield, *Tort*, 3rd ed. (1946), p. 415.

⁶³ Salmond, *Torts*, 10th ed. (1945), Preface, p. viii.

⁶⁴ Professor Millner’s phrase: *op. cit.*, p. 118.

⁶⁵ Salmond, *op. cit.*, p. ix.

⁶⁶ 63 L.Q.R. at pp. 517–518.

conflicting causes, what is 'the' cause of the accident. Where causes are numerous, as they often are, the courts are free to state them, assess their respective influences, and apportion the damages accordingly. For this reason many cases in which it would have previously been held that the defendant was alone to blame are now decided as being cases where both are to blame." It must have given the then Mr. Edmund Davies K.C.⁶⁷ great joy to be able to cite Mr. Justice Denning's review to Lord Justice Denning in *Davies v. Swan Motor Co. (Swansea) Ltd.* in 1949.⁶⁸ And it must have given Lord Justice Denning even greater joy to insist that "last opportunity," as a doctrine of law, was dead before the Act and that since the Act it was no longer a practical test and should disappear from the books.⁶⁹ In *Chisman v. Electromation (Export) Ltd.*⁷⁰ Lord Denning repeated his dismissal of the last opportunity rule and Lord Justice Edmund Davies, no doubt with contented recollections of his own efforts in *Davies v. Swan Motor Co.*, forcefully added: "After suffering for some years from progressive anaemia, it was killed off by the Law Reform (Contributory Negligence) Act of 1945, and I personally now decline to play any part in administering the kiss of life to the mummy." There have, of course, been troublesome cases on causation since 1945,⁷¹ but in general, in Professor Millner's words, the apportionment legislation has "enabled the court to dispense with artificial techniques and spurious causal distinctions for the purpose of reaching a just result in cases of combined negligence . . . the courts were now armed for the first time with a formula which enabled them to resolve the dispute fairly without resort to fictions."⁷² "No single rule can cover every factual situation, and each case must be considered on its facts."⁷³ Despite those who were reluctant to abandon the old *mumpsimus* this has been a mighty achievement indeed and one which would have gladdened the heart of Mr. Gradgrind.

V

THE ROOTING-OUT

As every Macaulay schoolboy knows, the notorious negatives outlined above have all disappeared during the lifetime of the *Cambridge Law*

⁶⁷ Now Lord Justice Edmund Davies.

⁶⁸ [1949] 2 K.B. 291, 299, 300.

⁶⁹ *Ibid.*, p. 321. Some writers have taken this to heart—others have not.

⁷⁰ (1969) 6 K.I.R. 456, 459.

⁷¹ *Stapley v. Gypsum Mines Ltd.* [1953] A.C. 663; *I.C.I. v. Shatwell* [1965] A.C. 656; *Sigurdson v. British Columbia Electric Ry Co. Ltd.* [1953] A.C. 291, for example.

⁷² Millner, *Negligence in Modern Law*, p. 117, 118.

⁷³ Winfield and Jolowicz, *Tort*, 9th ed., p. 113.

Journal. The *actio personalis* rule went in 1934⁷⁴; the rules as to joint tortfeasors and a husband's liability for his wife's torts, in 1935⁷⁵; the immunity of the Crown, in 1947⁷⁶; the doctrine of common employment, in 1948⁷⁷; the rules restricting actions between husband and wife, in 1962⁷⁸; the highways non-feasance rule, in 1964.⁷⁹ The all-or-nothing contributory negligence rule went, as we have seen, in 1945.⁸⁰

Most, but not all, of the no-duty rules have also gone. The privity-of-contract fallacy was exposed in *Donoghue v. Stevenson* in 1932. The general rule of no-duty in the making of a statement went with *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* in 1964.⁸¹ The special rules as to invitees and licensees were removed by the Occupiers' Liability Act 1957. The *Searle v. Wallbank* rule as to animals straying on to the highway went in October 1971 under section 8 of the Animals Act 1971.⁸² A lot has been achieved in the fifty years but there are, at the time of writing, at least two deplorable survivals, an undesirable off-shoot and a number of flourishing monkey-puzzles.

VI

SURVIVALS

The vendor-lessor immunity⁸³ is still with us^{83a} but the Law Commission have reported on it and submitted a draft Bill—the Defective Premises Bill.⁸⁴

An admirable example of rooting out is provided by the Law Commission's recommendations. "Any person who does work on land is under the general duty of care at the time when he does the

⁷⁴ Law Reform (Miscellaneous Provisions) Act 1934.

⁷⁵ Law Reform (Married Women and Tortfeasors) Act 1935.

⁷⁶ Crown Proceedings Act 1947.

⁷⁷ Law Reform (Personal Injuries) Act 1948.

⁷⁸ Law Reform (Husband and Wife) Act 1962.

⁷⁹ Highways (Miscellaneous Provisions) Act 1961, s. 1 not in force until 1964. The interpretation and application of the statutory provisions are not free from doubt: *Griffiths v. Liverpool Corporation* [1967] 1 Q.B. 374 (C.A.); *Meggs v. Liverpool Corporation* [1968] 1 All E.R. 1137; *Littler v. Liverpool Corporation* [1968] 1 All E.R. 343.

⁸⁰ Law Reform (Contributory Negligence) Act 1945.

⁸¹ But subject to the restrictions now proclaimed by a majority of three to two in *Mutual Life and Citizens' Assurance Co. v. Evatt* [1971] 2 W.L.R. 23 (P.C.).

⁸² The negative is simply rooted out: "So much of the rules of the common law relating to liability for negligence as excludes or restricts the duty which a person might owe to others to take such care as is reasonable to see that damage is not causal by animals straying on to a highway is hereby abolished"—with an exception for common land, customary land and town or village greens.

⁸³ *Supra*, p. 181.

^{83a} Unless the resounding dicta of Lord Denning M.R. and Sachs L.J. in *Dutton v. Bognor Regis U.D.C.* [1972] 2 W.L.R. 299, 308-310, 316-317, can be said to have rooted it out without the aid of the House of Lords or statute.

⁸⁴ Law Com. No. 40, 15 December 1970.

work, but if he subsequently sells or lets the premises on which he did the work, his potential liability for breach of that duty comes to an end. The transaction of sale or letting alone confers the immunity. It is only necessary, therefore, to provide that a sale or letting shall have no effect upon a pre-existing duty arising from the doing of work and the general principles of negligence will apply. A person who does work on his own land, just as a person who does work on someone else's land, will be liable for injury or damage which can be properly attributed to his negligent act, subject to the usual defences, such as contributory negligence, which are generally applicable."⁸⁵ The Commission accordingly recommend that the vendor's and lessor's immunity from liability for the consequences of their own negligent acts should be removed by a statutory provision to that effect.⁸⁶ They provide a draft:

2.—(1) Where work of construction, repair, maintenance, or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work shall not be abated by the subsequent disposal of the premises by the person who owed the duty.⁸⁷

The draft Bill deals with other matters⁸⁸ relating to defective premises and some of it may need further thought, but the simplicity of the recommendation set out above is such that the suggested statutory provision could easily be included in any Law Reform (Miscellaneous Provisions) Act without waiting for approval of the comprehensive Bill. If this were done, one more fossil would be safely in the museum.

Another unhappy survival is the lawyers' law confusion over liability to trespassers. A vast amount has been written about the duty, or absence of duty, towards trespassers.⁸⁹ The true reasons for a trespasser's disability have never been clear⁹⁰ and differing views as to the statement of the duty owed to him have been

⁸⁵ *Ibid.*, para. 46.

⁸⁶ *Ibid.*, para. 47. Cf. the "rooting-out" in s. 8 of the Animals Act 1971.

⁸⁷ For criticism of the drafting, albeit approval of the intent, see Winfield & Jolowicz, *Tort*, 9th ed., p. 206.

⁸⁸ e.g., a duty in respect of new dwellings to see that work is done in a workmanlike or professional manner with proper materials and so that the dwelling will be fit for habitation; a duty on a vendor or lessor in respect of defects actually known to him; and amendments to the Occupiers' Liability Act 1957, s. 4.

⁸⁹ e.g., Winfield & Jolowicz, *Tort*, 9th ed., pp. 189-195; Salmond, *Torts*, 15th ed., pp. 358-366; Clerk & Lindsell, *Torts*, 13th ed., pp. 623-632; Millner, *Negligence in Modern Law*, pp. 47-54; Atiyah, *Vicarious Liability*, pp. 248-251; Hughes (1959) 68 *Yale Law Journal*, No. 4, p. 633; W. O. Hart (1931) 47 *L.Q.R.* 92; Goodhart (1963) 79 *L.Q.R.* 586 and (1964) 80 *L.Q.R.* 559; Samuels (1964) 27 *M.L.R.* 88, 464; Atiyah (1965) 81 *L.Q.R.* 186; Fleming (1966) 82 *L.Q.R.* 25; North, *Occupiers' Liability*, pp. 162-203.

⁹⁰ Clerk & Lindsell, *Torts*, 13th ed., pp. 623-624.

expressed by the courts.⁹¹ Trespassers are excluded from the common duty of care under the Occupiers' Liability Act in England but not in Scotland. Australian decisions⁹² had gone far to rationalise the law and the Court of Appeal's decision in *Videan v. British Transport Commission*⁹³ in 1963 had met with a substantial measure of approval. But the decision and reasoning of the Judicial Committee of the Privy Council in *Commissioner for Railways v. Quinlan*⁹⁴ put the clock back to *Latham v. Johnson and Nephew Ltd.*⁹⁵ in 1913 and *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* in 1929.⁹⁶ Liability was to be based on wilful injury to, or reckless disregard of the presence of, a trespasser known or "as good as" known to be on the premises. There was no duty to take reasonable care.⁹⁷ One of the most heartening judicial protests of recent time was, however, made by a unanimous Court of Appeal in *Herrington v. British Railways Board*.⁹⁸ Lords Justices Salmon, Edmund Davies and Cross roundly condemned the *Addie v. Dumbreck* and *Quinlan* approach. Lord Justice Salmon expressed the hope that the House of Lords, no longer absolutely bound by its own decisions, might soon have an opportunity of reconsidering the mid-nineteenth century proposition restated in *Addie's* case.^{98a} "The doctrine that a trespasser, however innocent, enters land at his own risk, that in no circumstances is he owed a duty of reasonable or any care by the owners or occupiers of the land however conscious they may be of the likelihood of his presence and of the grave risk

⁹¹ *Ibid.* pp. 627-629.

⁹² e.g., *Thompson v. Bankstown Corp.* (1953) 87 C.L.R. 619. *Rich v. Commissioner for Railways (N.S.W.)* (1959) 101 C.L.R. 135; *Commissioner for Railways (N.S.W.) v. Quinlan* (1960) S.R.(N.S.W.) 629.

⁹³ [1963] 2 Q.B. 650, particularly Lord Denning's exposition of a test of foreseeability and absence of reasonable care, pp. 665-667; Clerk & Lindsell, *Torts*, 13th ed., p. 627.

⁹⁴ [1964] A.C. 1054 (P.C.).

⁹⁵ [1913] 1 K.B. 398.

⁹⁶ [1929] A.C. 358.

⁹⁷ As always, Professor Millner had the telling phrase. The *Quinlan* formula was "sadly retrogressive" and "scholastic and retrograde." *Negligence in Modern Law*, pp. 53, 178.

⁹⁸ [1971] 2 Q.B. 107.

^{98a} The House of Lords has affirmed the decision in *Herrington*, "The Times", 17 February 1972. No full report is available at the time of going to press but it seems that an occupier's duty to trespassers is to vary according to his knowledge, ability and resources. Liability would depend on whether a conscientious humane man with his knowledge, skill and resources could reasonably have been expected to have done or refrained from doing before the accident something which would have avoided it. An impecunious occupier with little assistance at hand would often be excused from doing something which a large organisation would be expected to do (*per* Lord Reid). An occupier's conduct must be "humane" or "decent." A compromise must be reached between the demands of humanity and the need to avoid placing undue burdens on occupiers (*per* Lord Wilberforce). It may be that the *Addie* rules are "drastically modified," or that they are "developed but not denied." We can only "cultivate the faculty of patient expectancy" (*per* Mr. Asquith).

of terrible injury to which he will probably be exposed, may have been all very well when rights of property, particularly in land, were regarded as more sacrosanct than any other human right. . . . It is difficult to see why today this doctrine should not be buried with the artificial doctrine based on fictitious permission springing from a supposed allurements which was invented by the courts in an attempt to mitigate the harshness and injustice caused by the ancient legal dogma relating to infant trespassers."⁹⁹ The duty of care owed to a trespasser should, he thought, be the same duty as that owed to anyone else, a duty to take such care *if any* as was reasonable in all the circumstances. The circumstances that the plaintiff was a trespasser and the sort of trespasser he was would be of great importance.¹ The only duty to a burglar would still be not to do him any wilful or malicious injury.² But if the trespasser was a young child or an innocent wanderer on one's estate it would be contrary to common humanity to exclude him from the category of neighbour. Lord Justice Edmund Davies thought a simple rule could be formulated which paid due regard both to the claims of humanity and to property rights, as was abundantly established by the Occupiers' Liability (Scotland) Act 1960. The duty under section 2 (1) of that Act is owed "to persons entering on the premises" and is a duty to take such care, in respect of a danger, "as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger." The effect of this provision was admirably expressed by Lord Guthrie in *McGlone v. British Railways Board*.³ "At the beginning of the argument . . . it was submitted that, since the object of the subsection was to prevent persons from suffering injury on premises and since the categories no longer determined the duty, the same duty of care rested upon the occupier, whatever the category to which a person belonged, even if he were a housebreaker, and that the degree of care required depended on such matters as the nature of the risk on the particular premises. No doubt charity should be all-embracing but it would be a curious rule of law which would require an occupier of premises to take the same measures for safety of a thief entering a house in search of the family's valuables or of an intruder with murderous intent as for that of the physician called to the house to attend a sick inmate. That bizarre

⁹⁹ *Ibid.* pp. 119, 120.

¹ Contrast *Quinlan*: "it matters not whether the trespasser fills the unsympathetic part of the burglar or the sympathetic part of the traveller who has lost his way" ([1964] A.C. 1054, 1074).

² Salmond's comment that "a burglar who breaks his leg by falling down the stairs cannot complain that they were insecure" will remain as true as it was in 1923.

³ 1966 S.L.T. 2, 7, affirmed by the House of Lords, *ibid.* p. 8.

result is not required by the terms of section 2 (1), since such care towards a person bent on crime would in the circumstances not be reasonable. The illustrations are a *reductio ad absurdum* of the argument, but they do demonstrate that the nature and purpose of the entry are relevant, with the other circumstances, in determining the scope of the duty on the occupier. It would not, however, be in accordance with the subsection to adopt general rules as to the degree of care appropriate in the case of a trespasser, since that would indicate a return to the categories. *The intention of the Act is that each case should be decided on its own particular facts.*"⁴ And as Lord Justice Salmon put it: "The Scots are hardly noted for being impractical or unduly swayed by emotion. They have incorporated into their law the concept that a duty of care may be owed in some circumstances even to trespassers. The experience over the last ten years has proved that the catastrophes that have been supposed to be inseparable from such a course are entirely illusory."⁵ On the facts in *McGlone* the electrocuted boy of twelve failed in his claim—he had got through barbed wire and deliberately climbed up a concrete pole knowing it was forbidden and knowing it was dangerous. The precautions taken by the occupiers were, in the circumstances, reasonable. "The liability of an occupier cannot fairly be made to depend on the outcome of a conflict between his precautions to exclude entry and the ingenuity and agility of a youthful and determined trespasser."⁶ On the other hand, the six-year-old boy in *Herrington*—who fell on an electrified railway line after he had wandered from a meadow through a hole in a fence known to be dilapidated and to offer no barrier and to have been in that condition for an "inexcusable length of time"—would clearly have recovered under the Scottish Act, as indeed he did under the English common law, even within the *Quinlan* formula, on the ground of reckless disregard for his safety.⁷

If the Scottish formula were adopted in England another "ancient legal dogma" would be rooted out and in yet another instance liability would be decided as an issue of fact.⁸

⁴ Italics added. Cf. Samuels (1964) 27 M.L.R. 464, 468; Clerk & Lindsell, *Torts*, 13th ed., p. 624.

⁵ *Herrington v. B.R. Board* [1971] 2 Q.B. 107, 123, 124.

⁶ 1966 S.L.T. at p. 8.

⁷ See (1971) 87 L.Q.R. 168–172; (1971) 34 M.L.R. 458–461.

⁸ It might be thought fit to make special statutory provision in relation to users of rights of way. In rejecting an amendment to the Occupiers' Liability Bill designed to include "all persons lawfully on the premises" the then Solicitor-General (Sir Harry Hylton-Foster) said: "... if we did that we would necessarily include all categories of people whom nobody wants to include. We should necessarily include the users of public rights of way" (Standing Committee A, 26 March 1957, column 6). The Law Reform Committee had excluded such persons from its recommendations (Cmd. 9305, para. 33). The ground for the Court of Appeal's decision in *Greenhalgh v. British Railways Board*

VII

AN UNDESIRABLE OFF-SHOOT

The original Law Revision Committee was set up by Viscount Sankey L.C. in January 1934 "to consider how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor might from time to time refer to the Committee require revision in modern conditions." The maxim *actio personalis moritur cum persona*, and the rule that in a civil court the death of a human being could not be complained of as an injury, constituted one of four matters on which they were asked "to report specially as soon as may be." The committee clearly took the exhortation to speed very seriously. They produced an Interim Report⁹ within eight weeks and this was implemented by the Law Reform (Miscellaneous Provisions) Act 1934 in less than five months. The main purpose of the Report and the Act was, as we have seen, to get rid of the rule that a cause of action in tort for personal injuries did not survive *against* the estate of a deceased tortfeasor. This was, on the whole, achieved satisfactorily.¹⁰ But consideration had to be given to the other side of the coin—the death of the person against whom the wrong had been committed. This was more difficult, the committee thought, because the measure of damages was necessarily affected by the injured man's death. In result, the committee recommended that where a plaintiff died before judgment, or a person entitled to sue died before action commenced, *damages in the case of tort were to be limited to the loss to the estate*.¹¹ The Act of 1934,

[1969] 2 Q.B. 286 that users of public rights of way were not "visitors" within the Act was that only "persons who would at common law be treated as . . . invitees or licensees" are "visitors" within the Act (s. 1 (2)). This is indisputable but they are "persons entering on the premises" within the Scottish formula and the issue of "reasonable care if any . . ." would, in the absence of special provision, have to be faced, for they could hardly be in a worse position than trespassers.

⁹ Cmd. 4540; 7 March 1934.

¹⁰ Apart from the rules as to time limits which produced a sequence of nonsenses until the Law Reform (Limitation of Actions) Act 1954, s. 4 and the Proceedings against Estates Act 1970 repealed them. There were originally five exceptions to survival: libel, slander, seduction, enticement of a spouse and damages for adultery. The last three have ceased to have any significance as the causes of action themselves (and the action for breach of promise of marriage) were abolished on 1 January 1971 by the Law Reform (Miscellaneous Provisions) Act 1970, ss. 1, 4, 5. But defamation remains an exception and, incomprehensibly, the estate of a wealthy libeller, whose publications have admittedly caused substantial loss to his victim, continues to escape all liability. Contrast the action for slander of goods. (*Hatchard v. Mège* (1887) 18 Q.B.D. 771).

¹¹ Cmd. 4540, para. 15 (c) (d). Winfield had already written ((1929) Col.L.R. pp. 249-50). "Where, however, it is the injured party who has died, different considerations arise. It does not seem advisable that the remedy for a personal injury should survive. If his successors argue that they are so much the worse off in pocket, unless they can sue, they assume that what the deceased would

however, contained no such limitation. It provided that where the death of a person had been caused by the act or omission which gave rise to his cause of action, damages should be "calculated without reference to any loss or gain to this estate consequent on his death."¹² This was something quite different from the committee's recommendation. The exclusion from the damages of loss to the estate caused by the death was not a limitation of the damages to loss to the estate caused by the tort. On the wording of the Act the deceased's estate could recover what the deceased could have recovered at the time of his death, including damages for pain and suffering. And while the committee had been deliberating and the draftsman working on the Bill, Acton J. had been awarding a Mr. Flint, aged 70, a substantial sum¹³ as damages for shortened expectation of life. The Court of Appeal did not pronounce in favour of a living plaintiff's claim to such damages until November of 1934,¹⁴ but, when it did, the decision of the House of Lords in 1937¹⁵ that the claim would survive on death became inevitable on the wording of the Act.

And so began the rigmarole of quantifying the damages to be awarded for the shortened expectation of the life of a person already dead.¹⁶ It was a sorry story, resulting in the "judicial legislation" of the House of Lords in *Benham v. Gambling*¹⁷ and ultimately in the blessing of the Lords in *Yorkshire Electricity Board v. Naylor*¹⁸

have recovered must have remained part of his estate until his death, and this is by no means certain; and they seek to set up a principle consonant neither with abstract justice nor with the law of torts,—that they shall profit by a wrong which in origin did not harm them." In 1934 Stallybrass accepted that the Law Revision Committee had "substantially adopted Winfield's view by in effect recommending . . . that plaintiff executors should only be able to recover for loss to the estate . . ." (Salmond, *Torts*, 8th ed. (1934), p. 77.)

¹² Except funeral expenses, s. 1 (2) (c).

¹³ The general damages were £4,000 but these covered the plaintiff's grave personal injuries—"the wreck of his physical life"—as well as the accepted reduction of his expectation of life to something under a year. In the Court of Appeal, Roche L.J. would have reduced the overall figure to £3,000.

¹⁴ *Flint v. Lovell* [1935] 1 K.B. 354, decided after the Act had come into force.

¹⁵ *Rose v. Ford* [1937] A.C. 286. It is accepted that claims for personal injury and shortened expectation of life were not in the contemplation of the Law Revision Committee and were in effect contrary to their recommendations; John Foster, *Law Revision* (1938) 2 M.L.R. 14, 15.

¹⁶ Judges and juries rode a crazy steeplechase throughout 1938: £90 was awarded by a common jury for a boy of three years, the Court of Appeal ordering a new trial on the ground of inadequacy; £1,000 for a girl of three, again by a common jury, the judge stating that he himself would have awarded £150; £1,500 for a girl of eight, by a judge; £2,000 for a man of twenty-one by a special jury; £1,000 for a man of twenty-three, by a judge; £400 for each of three seamen aged twenty-three to twenty-six, £350 for each of two seamen aged thirty-five to thirty-seven, £300 for each of three seamen aged forty-one to forty-four (all being engaged in a "dangerous trade") all by a judge; £600 for a man of forty, by a jury; £600 for a woman of seventy-one, by a judge.

¹⁷ [1941] A.C. 157.

¹⁸ [1968] A.C. 529.

to the conventional arbitrary figure of £500.¹⁹ Lord Devlin has said that the law "endeavoured to avoid two results both of which it considered would be undesirable. The one . . . that a wrongdoer should have to pay large sums for disabling and nothing for killing; the other . . . that the large sum appropriate to total disablement should come as a windfall to the beneficiaries of the victim's estate." To arrive at a figure which avoids these two undesirable results was, he thought, a matter for compromise, and not for judicial determination. He suggested a short Act to fix some suitable sum.²⁰ But why should any such sum be paid into the estate? Why should £500, for instance, go to the British Museum or a remote relation of the deceased?²¹ The only answer is as a deterrent to the defendant and as such it is derisory. "In any event, [such] damages are compensatory and not punitive. Even if they were punitive, the insurance companies would be the whipping-boys and the tortfeasors would escape save to the extent that their premiums might be increased."²²

It is, perhaps, idle to stress that the whole story did not need to be, and might never have been, told. The Law Revision Committee might have taken a little longer than it did²³ to spell out its recommendations and more thought might have preceded the drafting of the Bill. Or the Commonwealth precedent could have been followed. In New Zealand the red light was seen at once. Following the English Act of 1934, the *actio personalis* rule was abolished in 1935. But in 1937 an amending Act provided that damages recoverable for the benefit of the estate of a deceased person should "not include any damages for his pain and suffering, or for any bodily or mental harm suffered by him, or for the curtailment of his expectation of life."²⁴ Now that we have suffered our own peculiarly English nonsense for over thirty years we can only concur

¹⁹ Their Lordships clung desperately to this figure and rejected the Court of Appeal's majority view that for a normal adult in 1967 it should be £1,000 ([1967] 1 Q.B. 244). For a professional criminal half-price has been held proper (*Burns v. Edman* [1970] 2 Q.B. 541) despite the nineteenth century suggestion by the most widely known member of the Inner Temple that "his capacity for innocent enjoyment is just as great as any honest man's."

²⁰ [1968] A.C. 529, 550.

²¹ If the estate goes to the dependants claiming under the Fatal Accidents Acts, the £500 is taken into account in assessing the damages for pecuniary loss (*Davies v. Powell Duffryn Collieries Ltd.* [1942] A.C. 601)—it is given with one hand and taken away with the other. In the case of parents who have lost a young child it may be effective in practice as *solatium* for grief, which is, of course, not recognised by English law. If *solatium* is desirable it should be allowed explicitly by statute, not as a bit of accidental humbug.

²² *Per Salmon L.J.* [1967] 1 Q.B. at p. 259. Cf. James, *General Principles of the Law of Torts*, 3rd ed., pp. 408-409; Winfield, *Tort*, 8th ed., pp. 682-684.

²³ 10 January to 7 March.

²⁴ (1938) 57 *Law Notes* 260, 291. Australian and some of the Canadian survival statutes contain similar provisions.

in the plea for some statutory change put forward by Lord Justice Salmon and Lord Devlin. Lord Justice Salmon, taking together the *Benham v. Gambling* type of case and the *H. West & Son Ltd. v. Shephard*²⁵ and *Wise v. Kaye*²⁶ type of case, said: "Now that law reform is in the air, perhaps this problem may be reconsidered. These decisions, if allowed to stand together, certainly add no lustre to the common law of England."²⁷ Recovery for the shortened expectation of the life of one already dead is an off-shoot of a scrambled Report and an over-hasty Statute. Reconsideration is necessary and reconsideration should, perhaps, involve the whole problem of damages for shortened expectation of life whether the victim be alive or dead, and for loss of amenity or loss of faculty of the "as good as dead."²⁸

VIII

THE RESIDUE

Every lawyer will have his own list of surviving infelicities in the law of tort. Some have acquired notoriety. On some work is in progress. What, for instance, is to be the approach to "non-physical loss" in general and, in particular, to losses suffered by reason of damage to property in which the plaintiff has no proprietary interest? Is the answer to be found in Lord Denning's broadside: "How are we to say when economic loss is too remote or not? Where is the line to be drawn? Lawyers are continually asking that question. But the judges are never defeated by it. We may not be able to draw the line with precision, but we can always say on which side of it any particular case falls. . . . Where . . . is the line to be drawn? Only 'where in the particular case the good sense of the . . . judge decides.' That is how Lord Wright put it in the case of nervous shock . . . and I do not think that we can get any nearer than that. But by building up a body of case law, we shall give guidance to practitioners sufficient for all the ordinary cases that arise."²⁹ The subject was considered

²⁵ [1964] A.C. 326.

²⁶ [1962] 1 Q.B. 638.

²⁷ [1967] 1 Q.B. at p. 259.

²⁸ This note about damages for shortened expectation of life was written early in 1971. Many of the points mentioned have since been considered in Law Commission Published Working Paper no. 41—Personal Injury Litigation, Assessment of Damages—dated 18 October 1971, to which reference should be made.

²⁹ *SCM (U.K.) Ltd. v. W. J. Whittall & Son Ltd.* [1971] 1 Q.B. 337; *Weller & Co. v. Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569; *Electrochrome Ltd. v. Welsh Plastics Ltd.* [1968] 2 All E.R. 205; *British Celanese Ltd. v. A. H. Hunt (Capacitors) Ltd.* [1969] 1 W.L.R. 959; *Margarine Union G.m.b.H. v. Cambay Prince Steamship Co. Ltd.* [1969] 1 Q.B. 219; Atiyah, "Negligence and Economic Loss" (1967) 83 L.Q.R. 248; C. R. Symmons, "The Duty of Care in Negligence" (1971) 34 M.L.R. 394.

in July 1971 at a Legal Workshop organised by the Institute of Advanced Legal Studies.³⁰

There are many archaisms and artificialities in the torts of conversion and detainment. Some ancient rules of law could well be rooted out. These are the subject of a report by the Law Reform Committee.³¹

There is the perennial vexed question: when will a civil action lie for breach of a statutory duty? ³² An analysis of the cases reveals no consistent pattern of interpretation and there is much to be said for the Law Commission's recommendation that, in future statutes, it shall be presumed, unless express provision to the contrary is made, that a breach of a statutory duty is intended to be actionable at the suit of any person who sustains damage in consequence of the breach.³³

Liability under *Rylands v. Fletcher*,³⁴ liability for fire, liability in nuisance and liability for the faults of independent contractors are all subjects that bristle with problems of lawyers' law. The Law Commission has said ³⁵: "Although this branch of the law has acquired a greatly increased importance in modern conditions, its haphazard development has resulted in many distinctions of a highly technical character not apparently justified by differences in the subject matter," and has described the common law of strict liability as "complex, uncertain and inconsistent in principle." The Law Commission's report provides an admirable analysis of strict liability at common law and convincingly demonstrates its inconsistencies, but the Commission reluctantly conclude that it is not feasible to make recommendations for legislative action without first considering the principle of liability for personal injury accidents and the possible distinction between liability for personal injury and liability for other accidents. The rules of strict liability will thus continue for the time being to gladden the hearts of examiners, baffle the minds of students, and exasperate the legal profession and its customers.

The law of libel and slander is always under fire and the Lord Chancellor has accordingly appointed a Committee under Mr. Justice Faulks to "consider whether, in the light of the working of the Act of 1952, any changes are desirable in the law, practice and procedure relating to actions for defamation."

³⁰ A paper will appear in J.S.P.T.L.

³¹ Cmd. 4774. 18th Report (Conversion and Detainment), September 1971.

³² Samuels (1971) 121 New L.J. 610.

³³ Law.Com. No. 21, *The Interpretation of Statutes*, June 1969, para. 38; Appendix A (4).

³⁴ (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

³⁵ Law.Com. No. 32, *Civil Liability for Dangerous Things and Activities*, November 1970.

We have not finished with *Hedley Byrne v. Heller*³⁶ on mis-statements, and perhaps not with *Rondel v. Worsley*³⁷ on professional negligence. It remains open to argument whether *The Wagon Mound*³⁸ has done anything more than make it difficult to arrive at decisions no different from those that would have been achieved with ease under *Re Polemis*.³⁹

It may be that in the next half-century an answer will be given to the question put by Professor Heuston⁴⁰ (and many others) "Has not the time come when we should seriously consider whether that part of the law of torts which attempts to re-distribute the losses inevitably incidental to the processes of modern industrial society ought not to be abolished and replaced by a system of insurance administered outside the ordinary courts?"⁴¹ One thing is certain—an affirmative answer will not come in the lifetime of the writer of this note who will continue to welcome even the piecemeal "rooting out" of nonsense and comfort himself in well-worn but reputable Latin:

*"Virtus est vitium fugere, et sapientia prima
Stultitia caruisse."*

³⁶ C. Harvey (1970) 120 New L.J. 1155: "Negligent statements—the wilderness revisited."

³⁷ [1969] 1 A.C. 191.

³⁸ [1961] A.C. 388.

³⁹ [1921] 3 K.B. 560.

⁴⁰ (1961) 6 J.S.P.T.L. 26, 33.

⁴¹ See Atiyah, *Accidents, Compensation and the Law*; Elliott and Street, *Road Accidents*; (1969) 119 New L.J. 653; Fitzgerald and West (1969) 119 New L.J. 727; Atiyah (1969) 119 New L.J. 863.

CIVIL LAW CONCEPTS IN THE CRIMINAL LAW

J. C. SMITH

At this juncture it is convenient in connection with the older authorities concerned with obtaining money or chattels by false pretences to mention a point of some importance in relation to the Theft Act 1968. That is an Act designed to simplify the law—it uses words in their natural meaning and is to be construed thus to produce sensible results; when that Act is under examination, this Court deprecates attempts to bring into too close consideration the finer distinctions in the civil law as to the precise moment when contractual communications take effect or when property passes.

The anxiety here¹ expressed by Sachs L.J. to keep the Theft Act free from the complexities of the civil law is very understandable for the history of the invocation of civil law concepts in the criminal law has not been a happy one; and it is in the law of stealing that by far the greatest difficulties have arisen. Matters have been even worse when the civil courts have invoked the concepts of the criminal law; the long line of civil cases, where the judges struggled with the distinction between obtaining by false pretences and larceny by a trick, is a sufficient witness to that.² Nevertheless, a complete separation between the civil and the criminal law is neither possible nor desirable. If the law is not to be brought into disrepute, there must at least be such consistency between the two branches of the law that the Civil Division of the Court of Appeal does not find itself holding a transaction to be enforceable by a plaintiff while the Criminal Division is sending him to prison for entering into it. It would be intolerable if the criminal law, on the one hand, and the law of tort and contract, on the other, were to impose conflicting duties on the subject. In the law of theft in particular the involvement of the criminal law with civil law concepts must go much beyond this. The law of theft exists to protect the proprietary interests of citizens and assumes the existence of the whole law of property: "Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest)": Theft Act, s. 5 (1). So long as the law is unwilling to treat the

¹ *Baxter* (1971) 55 Cr.App.R. 214 at p. 220.

² See *Russell on Crime* (12th ed., 1964), Vol. 2, pp. 926-947.

dishonest debtor as a thief, except in the rather special circumstances provided for in section 5 (3) and (4) and section 16 of the Act, the criminal courts will have to distinguish between the holder of a proprietary interest and a mere creditor. We cannot have a criminal law protecting proprietary interests without taking full account of what those proprietary interests are. Once the civil law is involved, it must be wholly involved; it is not possible to apply it and yet ignore its "finer distinctions." In this article it is proposed to explore some of the problems of the relation between the civil and criminal law mainly, though not exclusively, in relation to the law of theft.

Unnecessary invocation of civil law concepts

Sometimes the courts have introduced the refinements of the civil law into the law of crime when there was no obvious necessity to do so. In some cases the courts have held themselves bound to interpret a word in the sense which it bears in the civil law, even though this defeated the probable intention of Parliament and produced an undesirable result. In *Fisher v. Bell*³ the question was whether a shopkeeper who displayed in his shop window a flick-knife bearing a price ticket had *offered* it for sale, contrary to the Restriction of Offensive Weapons Act 1959. The Divisional Court held that he had not done so because:

... any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract.⁴

This was not the exclusive reason for the decision. It was pointed out that many statutes use the words "offering or exposing for sale," suggesting that Parliament is aware of the distinction and provides for mere exposure when that is intended to be an offence. But the main reason is clearly that given above. The court recognised that this was an "offer" in the ordinary, common usage of that expression. Lord Parker C.J. said:

I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just non-

³ [1961] 1 Q.B. 394. *Mella v. Monahan* [1961] Crim.L.R. 175, gave the same answer to a similar problem under s. 2 (1) of the Obscene Publications Act 1959. The law was amended by the Obscene Publications Act 1964, s. 1 (1).

⁴ At p. 399.

sense. In ordinary language it is there inviting people to buy it, and it is for sale.⁵

It was decided that the technical meaning of the word in the civil law must prevail over its ordinary natural meaning. The court held that it had no choice in the matter—the Lord Chief Justice was “driven reluctantly” to this conclusion. The decision brought a speedy reaction from Parliament—an amendment to the law by the Restriction of Offensive Weapons Act 1961 which extended the offence to one who “exposes or has in his possession for the purpose of sale or hire.” *Fisher v. Bell* was criticised; but the court firmly re-asserted its view in *Partridge v. Crittenden*⁶ where an advertisement in a periodical, “Bramblefinch cocks, Bramblefinch hens, 25s. each,” was held not to be “an offer” to sell a live, wild bird contrary to the Protection of Birds Act 1954, because this was only an invitation to treat and not an offer in the law of contract. Though Parliament might be thought to have expressed its view about *Fisher v. Bell* by overruling it, the court reiterated that to give a wider meaning to “offer” would be “a naked usurpation of the legislative function under the thin disguise of interpretation.”

It is respectfully submitted that in these two cases the court took much too restricted a view of its powers of construction. It proceeded as if there were an irrebuttable presumption that a word which has a definite meaning in the civil law and a wider ordinary popular meaning must be interpreted in the civil law sense. In the Trade Descriptions Act 1968, Parliament has used the word “offers” in the wider sense and left no doubt of its intentions by providing: “A person exposing goods for supply or having goods in his possession for supply shall be deemed to offer to supply them” (section 6); and “a person advertising goods as available for supply shall be taken as offering to supply them” (section 11 (3) (d)).

No doubt *Fisher v. Bell* and *Partridge v. Crittenden* compelled the Parliamentary draftsman to spell out his intention in this way. It is very unfortunate however if, whenever Parliament wishes to use in a wider sense a word which has a legal meaning in the civil law, it has to spell out its intention in this way. The mischief at which the statute in these two cases was aimed bore no relation to the policies which underlie the law concerning the formation of contracts. No conflict of civil and criminal law would have resulted from giving “offer” its ordinary popular meaning. The lesson of these cases, it is submitted, is that the civil law concept should be imported into the criminal law only where the context shows that

⁵ *Ibid.*

⁶ [1968] 1 W.L.R. 1204.

this must have been intended or where to do so will achieve the purpose of the criminal legislation.

The Court of Appeal has recently taken a different approach in *Bonner*⁷ from that of the Divisional Court in the two cases discussed above. Bonner was convicted of stealing metal from Webb. The defence was that they had been partners, that the metal was partnership property and that Bonner thought he had a right to take it. The judge directed that, if the metal was partnership property and Bonner took it, intending to deprive Webb permanently of his share and knowing that he had no legal right to take it, he was guilty of theft of the whole property. It was argued at the trial that, because there was a special provision in the Larceny Act 1916, s. 40 (4), dealing with theft by a partner of partnership property and no such provision in the Theft Act it was to be inferred that such conduct was no longer a crime. This argument was rejected by the judge and, though the point was not argued on appeal, the Court of Appeal went out of its way to concur in his ruling. It could have been disastrous if the argument had been accepted because the Theft Act makes no express provision for all sorts of things which were provided for in the Larceny Act, like, for example, taking by a trick or by intimidation. These provisions were necessary in the Larceny Act because of the narrow terms of the basic definition of larceny. Theft is defined in broad terms and, if the definition is reasonably interpreted, it covers these situations without their being expressly spelled out. On appeal, however, the case was put differently and in a manner more relevant to this article. It was argued that there had been no appropriation of the metal, because the act in question would not amount to conversion in the civil law. Bonner relied on authorities which hold that one joint owner of a chattel cannot succeed in an action against another joint owner unless the defendant has destroyed the chattel or dealt with it in such a manner as to deprive the plaintiff of his interest in it—as by selling it to a bona fide purchaser in market overt. In the present case the metal continued to exist and if Webb was a joint owner he remained a joint owner throughout. Bonner had done nothing which could deprive him of his interest. The argument assumes that “appropriation” is the same as “conversion” and the Criminal Law Revision Committee indeed thought the meaning of the two words was the same:

The expression “dishonestly appropriates” in clause 1 (1) means the same as “fraudulently converts to his own use or benefit . . .” but the former expression is shorter and, we hope, clearer. There is an argument for keeping the word “converts” because it is

⁷ [1970] 1 W.L.R. 838.

well understood. But it is a lawyer's word, and those not used to legal language might naturally think that it meant changing something or exchanging property for other property. "Appropriates" seems altogether a better word.⁸

The *Fisher v. Bell* approach might thus have led to acceptance of the accused's argument. Appropriation means the same as conversion: conversion is a legal concept which Parliament must be taken to understand and (assuming the authorities quoted to be correct) it does not include appropriation by one co-owner of the other's property. The law of conversion is complicated and highly technical and, had this argument been successful, the way might well have been open for more technical evasions of the law. Happily, the argument was rejected. By section 5 (1) of the Theft Act, property belongs to any person having in it any proprietary right or interest. Property may "belong to" more than one person; for example, where property is bailed, it belongs to both bailor and bailee—and each may steal from the other. Clearly partnership property belongs to each partner. If one partner assumes an exclusive right to keep or deal with the property, intending to derive the other permanently of his proprietary interest, he appropriates and steals the property.

The decision creates no problems of consistency between the civil and the criminal law. A man has a "right" in the sense of a liberty or privilege to do anything that other persons have no right that he shall not do *and* that is not forbidden by the criminal law. Our civil law "rights" in this sense are frequently restricted by the criminal law. If the authorities quoted in *Bonner* are correct, one joint owner is at liberty, if one looks at the civil law alone, to appropriate the jointly owned property to his exclusive use. Such liberty has long been curtailed, and rightly so, by the criminal law.

Where the context requires the civil law concept

Sometimes the context in which a word is found points so clearly to the concept of the civil law that the court is bound to invoke it. Section 5 (4) of the Theft Act provides:

Where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds shall be regarded (as against him) as belonging to the person entitled to restoration, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property or proceeds.

⁸ Eighth Report (Cmnd. 2977), p. 19.

Parliament can hardly be supposed to have intended the word "obligation" to mean anything other than a legal obligation. "Obligation" is of course capable of a wider meaning. It is commonly used to include moral obligations. It is however scarcely credible that Parliament could have intended so vague a concept to determine the existence of a crime. Here the context points clearly to the legal meaning of the word. If so, section 5 (4) necessarily incorporates a large and complicated area of the civil law into the Act. This is no doubt the explanation of an unreported case at a court of Quarter Sessions where the facts, as stated to the writer, were as follows:

The accused placed a bet for a small sum with a bookmaker and the horse backed won. The accused was entitled to receive 44s. 0d. When he went to collect his winnings, presumably because of a miscalculation, he was paid £26 4s. He took the money away with him but the mistake was speedily discovered and he was asked to return it. He refused and was charged with theft of £24. The learned chairman ruled that the facts proved did not amount to theft and directed an acquittal.

This looks a very unsatisfactory result. Assuming, however, that there was no mistake of identity, so that the ownership in the money passed to the accused, he could be guilty of theft, if at all, only through the operation of section 5 (4). Was the accused under an obligation to make restoration of money to the value of £24? At first sight it would seem that he was. This was a case of money paid under a mistake of fact and such money is generally recoverable. Wagering contracts are void, but the bookmaker would not be relying on such a contract; he would simply be claiming in quasi-contract to recover money paid under a mistake of fact. Nevertheless it has been held by the Court of Appeal in *Morgan v. Ashcroft*⁹ that money paid in such circumstances is not recoverable. Although a wagering contract is merely void and not illegal the money was not recoverable because (*per* Sir Wilfrid Greene M.R.):

... in order to ascertain whether or not an overpayment had been made, which the plaintiff was entitled to recover, it was necessary for the court to examine the state of account between the parties. Now, this, in my opinion, is a thing which the court is not entitled to do since by merely taking the account the court would necessarily be recognising wagering transactions as producing legal obligations and therefore doing the very thing which the Gaming Act 1845 does not permit to be done.¹⁰

Secondly, the Court applied a principle of the law of quasi-contract enunciated by Bramwell B. in *Aiken v. Short*¹¹: In order

⁹ [1938] 1 K.B. 49.

¹⁰ *At* p. 61.

¹¹ (1856) 1 H. & N. 210 at p. 215.

to entitle a person to recover back money paid under a mistake of fact the mistake must be as to a fact, which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money.

In *Morgan v. Ashcroft*, if the facts had been as the plaintiff believed them to be, he would not have been liable to pay the money since it would have been money won under a wagering contract and therefore irrecoverable. It would have been a case where it was merely desirable that he should pay, that is, there was a moral obligation to do so but no more.

It seems then that if a bookmaker accidentally overpays a client who, knowing that he has been overpaid, refuses to repay the money, no redress is available in the civil and, therefore, the criminal law. Such a person is making a dishonest profit and the result is scarcely creditable to English law. Nevertheless, it is thought that the decision of the court of quarter sessions referred to above was correct. The case is clearly distinguishable from *Bonner*; whereas there was no compelling reason to interpret "appropriation" as the equivalent of conversion in the civil law, it is, as pointed out above, scarcely conceivable that "obligation" in section 5 (4) can mean anything other than legal obligation.

If this interpretation of the Theft Act is right, is the Act itself then defective? It has been pointed out above that there is no reason why the criminal law should not impose limitations on the liberties or privileges which exist in the civil law. *Bonner's* "right" to appropriate the joint property has been taken away by the criminal law. Why should not the overpaid punter's "right" to keep the overpayment be similarly taken away? It is submitted that the Act is not defective. Section 5 (4) makes an inroad into the general principle that dishonest refusal to pay a debt is not criminal but it would be going too far to lay it down that a person commits an offence by refusing to pay money which he has no more than a moral obligation to pay. If the civil law says, as it does, that the defendant is the exclusive owner of the money, and under no obligation to repay even an equivalent sum, it would seem incongruous for the criminal law to say that he has stolen it. In *Bonner*, the injured co-owner did have a proprietary interest recognised, though inefficiently protected, by the civil law.

It may be of interest to note that if the bet had been placed with the "tote" the result would apparently have been different. The essence of a wager is that both sides stand to win or lose, depending on the outcome of the event in issue. The tote can neither win nor lose since it pays out a fixed proportion of the takings. A bet with the tote, surprisingly, is therefore not a wager. It is a valid and

enforceable contract¹² and it follows that where an "investor" in the tote is overpaid, the balance may be recovered back in quasi-contract. Such a person who declines to repay commits the *actus reus* of theft, for he has got property by another's mistake and he is under an obligation to make restoration of the value thereof. If dishonesty can be proved, he is guilty of theft.

So far as the policies of the criminal law are concerned, there is not a scrap of difference between the punter who is overpaid by the bookmaker and the "investor" who is overpaid by the tote. Other things being equal, both cases call for criminal sanctions to precisely the same extent. Yet, in this context, the civil law position cannot be ignored and, if there is injustice, it is the civil law, not the Theft Act, which is defective.¹³

Payments and deliveries made by mistake gave rise to the most controversial of all problems in the law of larceny and this was largely because they involved consideration of two civil law concepts, possession and trespass. The greatest simplification effected by the Theft Act lies in the elimination of these concepts from the definition of stealing, along with the related problems of the "consent of the owner." As the case examined above shows, however, this does not enable us by any means to ignore the civil law. One can hardly have a law of theft without the concept of property "belonging to another"; and this must inevitably, in some circumstances, call for an inquiry into the time of the conclusion of a contract or the passing of property and the existence of such civil law rights as sellers' and repairers' liens. It is instructive to examine one of the last cases decided under the Larceny Act 1916 where these problems arose.

In *Lacis v. Cashmarts*¹⁴ the defendant, Lacis, went to a "cash and carry" shop selling goods wholesale to retailers. A self-service system was in operation. Goods other than cigarettes were displayed on the shelves. Cigarettes were kept in a locked enclosure. The accused selected goods from the shelves to the value of £11 2s. 2d. and obtained cigarettes from the assistant in charge of the enclosure to the value of £174 5s. 10d. He took all these goods to the cash desk. An assistant took the goods, one by one, from the wire basket in which the accused had presented them, stated the price which the

¹² *Tote Investors Ltd. v. Smoker* [1968] 1 Q.B. 509 (C.A.).

¹³ Section 16 makes it an offence by deception to reduce, evade or defer a debt, "including one not legally enforceable." This probably includes void and illegal "debts" as well as debts which are merely unenforceable in the narrow sense: see the author's *Law of Theft*, paras. 325-328; *Aston and Hadley* [1970] 3 All E.R. 1045 at p. 1047 (C.A.). The gist of the offences under this section however lies in the deception. The defendant is guilty not because he refuses to pay or avoids payment of the "debt," but because he dishonestly persuades the "creditor" to reduce, forgive or defer the debt.

¹⁴ [1969] 2 Q.B. 400.

manager recorded on the till, and then placed the items in another container in which the accused subsequently removed the goods from the premises. The particular till went up only to £100 and then returned to zero. The figure recorded after the last item was dealt with was thus £85 8s. The manager demanded that sum, *i.e.*, £85 8s. and, either at that time or shortly after, handed the accused a receipt from the till, recording the full price of £185 8s. 0d. The accused paid £85 8s., knowing that it was not the true price, and took away the whole of the goods. When the mistake was discovered he refused to pay the balance of £100. He was then charged with and convicted by the magistrates of larceny of a quantity of cigarettes to the value of £100.

The argument on appeal to the Divisional Court raised interesting issues in the law of contract. It is clear law that the accused, by tendering the goods at the cash desk, was offering to buy them.¹⁵ No civil case has however decided what constitutes an acceptance in these circumstances. Counsel argued that the manager accepted the offer when he recorded the price on the till or, alternatively, when the assistant placed the goods in the container. This argument was not accepted. Lord Parker C.J. said:

Quite clearly there was a contract of some sort because nobody could suggest that the goods representing the £85 8s. that was paid, that is to say all the goods the price of which was recorded after the till had gone back to zero were not properly sold and delivered, and nobody had suggested indeed that the contract was or could have been rescinded. All as it seems to me that happened is that in connection with a perfectly good contract additional goods have been handed over.¹⁶

Thus the court clearly held that neither the recording of the price on the till and the delivery of the receipt nor the packing up of the goods for removal from the premises constituted acceptance of the offer to buy. The contract is concluded either

- (i) when the seller demands the price thereby accepting the offer to buy; or
- (ii) when the buyer pays the price, thereby accepting the seller's offer to sell at the price demanded. If this is a correct interpretation of the situation, then either (a) the tender of the goods by the buyer is not after all an offer but an invitation to treat; or, (b) if it is an offer, it is met by a counter offer from the seller. It does not seem to matter whether (a) or (b) is the correct view.

¹⁵ *Pharmaceutical Society of Great Britain v. Boots Cash Chemists* [1953] 1 Q.B. 401.

¹⁶ At p. 411.

Although the court held that there was no contract of sale in respect of the £100 worth of goods, they nevertheless quashed the conviction for larceny. The *ratio decidendi* is that there was no larceny because the manager intended the ownership in the whole of the goods to pass and because he had authority to do so. The court apparently thought that, notwithstanding this intention, the property did not pass; but that intention plus authority amounted to "the consent of the owner," so as to negative the offence. It has been argued elsewhere¹⁷ that, though the law of larceny was commonly so stated, the true effect of the authorities was that the crime could be committed even where there was an intention to pass ownership, if it did not in fact pass. It would be pointless to enter into argument about this since the repeal of the Larceny Act. The important matter now is the effect of the Theft Act on this situation. The court in *Lacis v. Cashmarts* had no doubts on the matter: "... when the Theft Act 1968 comes into operation on 1 January 1969, nobody in similar circumstances will be able to escape liability."¹⁸ If the court's view that ownership did not pass is correct, then there can be no doubt whatever that this dictum is also correct. *Lacis* dishonestly appropriated property belonging to another as soon as he assumed the rights of an owner over the cigarettes which in fact continued to belong to Cashmarts. There would be no need to invoke section 5 (4) which is only necessary where the accused is the exclusive owner in the civil law and it is necessary to vest a fictitious property in the prosecutor in order to satisfy the requirement that the property appropriated must belong to another. The Act does not absolve the court from ascertaining the civil law situation. It is because we know that the property has not passed that we can assert that theft has been committed.

There was one other difficulty in *Lacis v. Cashmarts* which the court thought reinforced the result of that case: the goods which were properly bought and paid for could not be distinguished from those which were delivered by mistake. It was impossible to say which were the stolen cartons. The court thought this an unavoidable and presumably fatal difficulty on the larceny charge but evidently did not think it created a difficulty under the Theft Act. It is submitted however that it is as much, or as little a difficulty for theft as for larceny. If you must identify the property to show that it was taken and carried away you must do so in order to show that it was appropriated. Fortunately, it is thought that this is not a substantial difficulty under either the old law or the new. If D receives ten cartons of which, as he knows, five have been sold

¹⁷ [1958] Crim.L.R. 92.

¹⁸ At p. 411.

to him and five delivered by mistake and he dishonestly assumes the rights of an owner over all, he may properly be held to have dishonestly appropriated five cartons though he does not know and no one else knows or can know which are the five he ought to have. The point was decided for the law of larceny by *Tideswell*¹⁹ and there can be little doubt that the same principle is applicable in the case of theft. A difficulty in *Lacis v. Cashmarts* might be that the cigarettes were mixed with other goods. If the invoice showed that the first £100 worth of goods consisted entirely of cigarettes, then there is no problem. If, however, the other goods were, or may have been included in the first £100 worth, then the difficulty could be met by charging theft of cigarettes to the value of £88 17s. 10d. (excluding all the other goods from the charge) or by simply charging theft of £100 worth of goods.

Lacis v. Cashmarts turned upon a close scrutiny of the civil law position and it is clear that slight differences in the facts may produce different results in the civil and possibly therefore in the criminal law. Suppose that D tenders five items at the cash desk of a supermarket. P rings up prices on the till for each item but, by mistake, records too low a price in the case of two items. P demands the total price recorded of £5. D, who has observed the mistake, knows the price should be £10. He pays £5 and takes the goods.

D made an offer to buy or invited an offer to sell at the marked price of the goods. P thus appears to have made a counter-offer or offer which D has accepted. The position in the civil law is not entirely clear. Certainly D will not be able to enforce a contract for the sale of all the goods for £5. He will not be allowed to "snatch at a bargain" in this way.²⁰ Beyond that there are two possible views: one, that there was no contract; two, that there was a contract at what D knew to be the true sale price of the goods—i.e., £10. If the former of these two views is correct then the hypothetical case is indistinguishable from *Lacis v. Cashmarts*. If, however, the second view is correct, then a different problem arises. D has contracted to buy all the goods and when they are delivered to him they are his. Thus, D can be convicted of theft, if at all, only by virtue of section 5 (4). Now D got the property by another's mistake in that P would probably not have parted with the goods had he known that the marked price had not been paid. The difficulty is that if there is a contract for the sale, D is not under an obligation "to make restoration . . . of the property or its proceeds or of the value thereof . . ." He is under an obli-

¹⁹ [1905] 2 K.B. 273.

²⁰ *Cf. Hartog v. Colin and Shields* [1939] 3 All E.R. 566.

gation to pay the balance of the price which is not the same thing as the value. In this situation, then, P's only remedy is in the civil law. It is the same case as that where P contracts to sell specific goods to D for £10 and subsequently delivers the specific goods with an invoice which, by mistake, states the price to be only £5. If D dishonestly pays £5 and keeps the goods, clearly he commits no offence.

Avoiding a conflict of duties in the civil and criminal law

It is one thing for the criminal law to impose a duty where none exists in the civil law as in *Bonner*. It is quite another thing for the criminal law to impose a duty where the civil law imposes a different and inconsistent duty. If it is clear, for example, that the law of tort requires the defendant to do a certain act, it would be intolerable if the criminal law were to hold the doing of that act to be an offence. This point was the basis of Devlin J.'s explanation of *Lomas*²¹ where the accused was held to be not guilty of aiding and abetting a burglary by returning to the burglar, King, a jemmy which the accused had borrowed from him. In *Bullock*²² Devlin J. said: "The appellant [Lomas] was not in a position to withhold the jemmy or permit King to use the jemmy." He elaborated on the point in *National Coal Board v. Gamble*²³:

In a sense a man who gives up to a criminal a weapon which the latter has a right to demand from him aids in the commission of the crime as much as if he sold or lent the article, but this has never been held to be aiding in law: see *R. v. Lomas* and *R. v. Bullock*. The reason, I think, is that in the former [? latter] case there is in law a positive act and in the latter [? former] only a negative one. In the transfer of property there must be either a physical delivery or a positive act of assent to a taking. But a man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detainue. Thus in law the former act is one of assistance voluntarily given and the latter is only a failure to prevent the commission of the crime by means of a forcible detention, which would not even be justified except in the case of felony.

This is in some respects a curious passage. *Lomas* and *Bullock* were both alleged cases of aiding and abetting in a burglary, which was of course a felony at that time. If, then, the forcible detention of the jemmy would have been justified, it was surely inconsistent to say that such detention would be detainue. But whether or not the act was a felony, it is difficult seriously to suppose that an action

²¹ (1913) 9 Cr.App.R. 220.

²² [1955] 1 W.L.R. 1 at p. 4.

²³ [1959] 1 Q.B. 11 at p. 20.

by a burglar for the return of his jemmy could succeed. A jemmy, according to the *Shorter Oxford Dictionary*, is "A crow-bar used by burglars, generally made in sections." It is true that it is the general rule of the civil law that

... a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.²⁴

This rule, however, is subject to "one obvious exception, namely, that the class of cases in which goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books."²⁵ If a jemmy is indeed an instrument specifically designed for burglaries, would it not fall into the same category as the obscene books? *National Coal Board v. Gamble* was however concerned with goods of a perfectly innocent character, namely coal. The question was whether the National Coal Board were guilty, through their servant, a weighbridge operator, of aiding and abetting the use on a highway of a lorry carrying a load in excess of that permitted by law. After the lorry had loaded coal at the Board's colliery, it was found to be overloaded, the driver said he would risk driving it on the road in that state and the Board's servant handed him the weighbridge ticket which enabled him to leave the premises and drive on to the highway. Both Goddard L.C.J. and Devlin J. (Slade J. dissented on another ground) thought that the case turned on the precise moment at which the property passed—it was one of those questions which Sachs L.J. wishes to exclude from consideration under the Theft Act. They held that, because the property did not pass until the weight had been agreed, the Board was guilty²⁶: the weighbridge operator could at that time have refused to assent to the sale of the load and could have withheld the weighbridge ticket. The judges evidently thought that the result would have been different if the ownership in the coal had passed before the weight was discovered, on the ground that, in that event, the Board would have had no right to detain either the lorry or the coal; to do so would have been (so the court

²⁴ *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. 65 at p. 71 (C.A.) per du Parc L.J.

²⁵ *Ibid.* at p. 72.

²⁶ The defence that the weighbridge operator was too inferior a servant to fix the Board with liability was not raised. Had it been raised, it would surely have succeeded.

seems to have thought) a tort or a breach of contract or both. The principle appears to be that the proprietary interest of the owner of a chattel prevails over the public interest that citizens shall not voluntarily assist in the commission of crime. But it is at least doubtful whether this can be regarded as a principle of universal validity.

Suppose that A goes into a shop, selects some rat poison, and hands over the price to the shopkeeper, B, who parcels up the poison. Just as B is about to put the poison into A's hand, A reveals that he intends to use it to poison his wife. Surely B commits no civil wrong by refusing to hand it over, even though the ownership has passed to A. It would be surprising if he could set up a contractual duty as a defence to a charge of abetting murder. The position does not seem nearly so clear where the crime is not so serious. When A calls at a garage to take delivery of the new car which he has bought and paid for, is the seller entitled to refuse delivery because A announces that he proposes to drive the car himself although he is disqualified from holding a licence or that he carries no insurance or that he is under age? The seller might be excused for thinking that the car was already sold and that what the buyer did with it was none of his business. This suggests there is a distinction which depends on the seriousness of the crime which is in view. We can no longer take refuge in the common law distinction between felonies and misdemeanours and there would be little satisfaction in so doing if we could. A rule to deal with this problem would clearly be difficult to formulate with any degree of precision; but the alternatives to such a rule are either (i) to say that all sellers (including the seller of rat poison) are under no liability if they hand over the sold goods to the intending criminal; or (ii) to say that all sellers (including the seller of the car) are liable for the crimes committed by the intending criminal. Whatever solution is found to this problem, however, must, it is submitted, be the same for both the civil and the criminal law. Notwithstanding the criticisms of Devlin J.'s approach in *National Coal Board v. Gamble*, the basic principle is surely right, that the criminal courts must not hold to be an offence that which it is the accused person's duty in the civil law to do.

It will have been noted that Devlin J. distinguished sharply between the sale or loan of an article on the one hand and the surrender of an article to its owner on the other. He evidently considered actions of the former type to amount to aiding and abetting any crime known to be intended by buyer or hirer and to be facilitated by the transaction. The distinction is between the man who enters into a transaction aware of the illegal purpose of the other party

from the start; and the man who discovers the illegal purpose of the other party to the transaction only after the transaction has passed the point at which that party acquires proprietary rights. Modern English authority favours the view that the former type of case amounts to aiding and abetting.²⁷ Professor Glanville Williams questions these authorities.²⁸ He relies on civil cases, notably *Hodgson v. Temple*,²⁹ in which the courts held that sellers could enforce contracts, notwithstanding that they knew, when entering into the transaction, of the illegal purpose of the buyer. If these cases are rightly decided, Professor Williams must be right in his view that the conduct in question could not incur criminal liability. Professor Williams asserts that *Hodgson v. Temple* is the case which would be followed in the civil courts today. Mr. Treitel, on the other hand, briefly but equally emphatically, takes the contrary view.³⁰

It is not entirely clear that the distinction drawn by Devlin J. is justified. If the illegality contemplated by the buyer is such as to render it illegal in the seller to enter into the contract, ought it not equally to render it unlawful in the seller to *perform* the contract when he learns of the illegality after entering into it? Should the fact that a proprietary interest has passed to the buyer really make such a fundamental difference? If the distinction is not a valid one, then we are faced with the same choice—all sales are valid, or none is valid, or it depends on the seriousness of illegality. It can hardly be seriously argued that all sales are valid; and while it is thought that the balance of the authorities favour the view that none is, there is much to be said for the middle view, particularly if illegal formation is not properly distinguishable from illegal performance.³¹ This is the view taken by the American courts.³²

Merely verbal problems distinguished

The possible conflicts between the civil and criminal law considered in connection with *National Coal Board v. Gamble* were matters of substance and not of mere words. That is, the court was concerned with a case where a failure to co-ordinate the civil

²⁷ See the discussion of the cases by Professor Glanville Williams, *The Criminal Law, The General Part* (2nd ed., 1961), pp. 370–380.

²⁸ *Ibid.*

²⁹ (1813) 5 Taunt. 181.

³⁰ *The Law of Contract* (3rd ed.) 358, n. 31. Williston's view of English law is the same as Treitel's: *Contracts*, Revised Ed., Section 1754–1756. The subject has not received detailed consideration from English writers on the law of contract.

³¹ The writer has previously defended the view that the seller is *always* liable when he knows of the buyer's illegal purpose at the time of making the contract: Smith & Hogan, *Criminal Law* (2nd ed.) 85–86; but the present re-examination of *National Coal Board v. Gamble* demonstrates the attractiveness of Professor Williams's view as to what the law should be.

³² Perkins, *Criminal Law*, p. 577.

and criminal law could result in the civil and criminal courts imposing inconsistent duties on the subject; and this must at all costs be avoided. Sometimes, however, the potential conflict which the court has sought to avoid has been a merely verbal one. This was the position in the case of *Lake v. Simmons*.³³ The question was simply whether the plaintiff, a jeweller, was entitled to recover under an insurance policy against theft of jewels. The policy contained a clause exempting the insurers from liability in the event of "loss by theft or dishonesty committed by any . . . customer . . . in respect of any goods entrusted to [her] by the assured." A dishonest woman, Esmé Ellison, induced the jeweller to let her have possession of jewellery for the purpose of showing it to two other persons with a view to purchase by them, and then disposed of it for her own benefit. McCardie J.³⁴ held that the insurers were not protected by the exception and were liable; he was reversed by the Court of Appeal (Atkin L.J. dissenting)³⁵ and restored by the House of Lords. McCardie J., the Court of Appeal and the House of Lords were all agreed that Ellison's conduct constituted larceny by a trick. Atkin L.J. regarded this as decisive of the question whether Ellison was "entrusted" within the meaning of the exception. Larceny, by definition, was taking "without the consent of the owner," and—"That at one and the same time she could both take the goods without the consent of the true owner and be entrusted with the goods by the true owner is to my mind a logical absurdity which I do not find it necessary to admit into our law."³⁶

Banks and Warrington L.JJ. were unperturbed by this logical absurdity, considering it to arise from an artificial distinction of the criminal law which should have no influence upon the construction of a commercial document. In the House of Lords, Viscount Sumner and Lord Atkinson, like Atkin L.J., placed great reliance on the fact that Ellison's conduct was larceny but Viscount Haldane and Lord Blanesburgh reached the same result simply by construing the document without reliance upon any doctrine of the criminal law.

It is submitted that the absurdity which worried Atkin L.J. was a purely verbal and not a substantial one. That is, there would have been nothing inconsistent or absurd in putting Esmé Ellison in gaol for stealing the jewellery and at the same time deciding that the jeweller had forfeited protection under the insurance policy by entrusting the jewellery to her as a customer. Atkin L.J.'s view indeed did not prevail for the courts held that a mercantile agent

³³ [1927] A.C. 487.

³⁴ [1926] 1 K.B. 366.

³⁵ [1926] 2 K.B. 51.

³⁶ [1926] 2 K.B. at p. 70-71.

could be in possession of goods with the consent of the owner even though the agent stole the goods (larceny by a trick) when he took possession of them.³⁷ It was certainly somewhat inelegant to say that, in the criminal law, the agent had taken the goods *without* the consent of the owner while, in the civil law, he was in possession *with* the consent of the owner. But since so to hold had no inconvenient practical consequences, whereas a contrary holding would have defeated the policy of the Factors Acts, this merely verbal inelegance was something which was rightly tolerated. In truth, the supposed lack of consent in the criminal law was a legal fiction of the common law, just as under section 5 (4) of the Theft Act,³⁸ by a statutory fiction, property is to be regarded as belonging to a person even though in truth (for ownership is a question of civil not criminal law) it does not belong to him at all.

It is submitted, therefore, that merely verbal inconsistencies between civil and criminal law with no adverse practical effect should not influence the court in either branch of the law.

The exercise of proprietary rights as crimes

If it is no offence to acquiesce in the owner's assertion of his right to possession, as *National Coal Board v. Gamble* holds, it might be thought absolutely clear that the mere exercise by the owner of those proprietary rights would be incapable of constituting an offence. But the decisions are by no means clear about this. In *Hibbert v. McKiernan*³⁹ the accused trespassed on golf links and found there eight balls which had been lost by their owners while playing on the links. He was convicted of stealing the balls from the secretary and members of the club. The magistrates found that the balls had been abandoned by their owners (perhaps confusing abandoning the search with abandoning property in the balls) but that they were in possession of the club which, accordingly, was the owner of them within the meaning of the Larceny Act 1916. In the magistrates' court and the divisional court it was argued that the finder, the accused, had a better title to the balls than the owner of the land, the club, relying on *Armory v. Delamirie*,⁴⁰ *Bridges v. Hawksworth*⁴¹ and *Hannah v. Peel*.⁴² These cases are notoriously difficult to reconcile with *Elwes v. Brigg Gas Co.*⁴³ and *South Staffordshire Water Co. v. Sharman*⁴⁴ and others. After

³⁷ *Pearson v. Rose and Young* [1951] 1 K.B. 275.

³⁸ Above, p. 201.

³⁹ [1948] 2 K.B. 142.

⁴⁰ (1722) 1 Stra. 505.

⁴¹ (1851) 21 L.J.Q.B. 75.

⁴² [1945] K.B. 509.

⁴³ (1886) 33 Ch.D. 562.

⁴⁴ [1896] 2 Q.B. 44.

some heavily humorous comments on the delight professors take in attempting to "reconcile the irreconcilable," Lord Goddard C.J. went on to hold that "these interesting questions do not in this case arise." He explained why:

We are here dealing with a charge of larceny; with a thief who took the balls *animo furandi*; not with a honest man who, finding an article on the land of another, proclaims that fact with a view to discovering the owner if he can, and when no owner comes forward, asserts a possessory title against the owner of the land on which it was found. We need not be troubled with nice questions relating to *animus domini*, *corpus possessionis*, *de facto* control or the like. Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent.⁴⁵

This scarcely does justice to the argument. The answer given by the Lord Chief Justice is that *Bridges v. Hawksworth* and cases to the same effect cannot be relied on because we are here dealing with a dishonest man—indeed a thief, which seems to pre-judge the issue somewhat. But suppose for a moment that *Bridges v. Hawksworth* was rightly decided. That is, the finder of money, the property of an unidentified third person, in the part of a shop to which the public are admitted has a better right to it than the shop-keeper. Suppose that D enters P's shop and sees a £1 note on the floor in front of the counter. Distracting P's attention, D picks it up—furtively, because he believes P has a better right to it than he has. But the hypothesis is that he is wrong; that as against P, D is entitled to take the note, and the civil courts will protect him in his possession of it. Now D certainly has an intention to steal, but there must be an *actus reus* as well as *mens rea* before a conviction can be upheld. If, in taking and keeping the note, D was doing exactly what the civil law says he is entitled (as against P) to do, can it really be said that he has committed the *actus reus* of stealing from P. Can the law say to D: "You have every right to take the £1 from P's shop and to keep it from P; but when you did just that, you stole the £1 because you had a dishonest intention"? This is something more than the merely verbal conflict which arose in *Lake v. Simmons*; it sets a criminal law duty and a civil law right in opposition to one another and that can hardly be good law.

On the facts of *Hibbert v. McKiernan* itself it is submitted that there is no doubt that the court reached the right conclusion, whether *Bridges v. Hawksworth* be right or wrong. The finder in *Bridges*

⁴⁵ At pp. 149-150.

v. *Hawksworth* was lawfully in the shop, whereas *Hibbert* was a trespasser on the golf course and this is surely a most significant distinction; the owner of land must have a better right to possession of chattels lying on it than a trespasser. If the balls had been lying on a public right of way across the golf course and had been found by a pedestrian while exercising his right to cross the course, then the problem of *Bridges v. Hawksworth* would have been directly raised; and it is submitted that it should not be answered simply by observing that the finder had behaved as a dishonest man.

The problem with which the court in *Hibbert v. McKiernan* dealt in so cavalier a fashion is of course still capable of arising under the Theft Act. The question would now be whether the finder dishonestly appropriated property belonging to another, and the only possible difficulty would be whether the balls "belong to" the owner of the course. Property, under the Theft Act, belongs to "any person having possession or control of it": section 5 (1). On the facts of the case there can scarcely be any doubt that the finder would be held guilty; but if the facts differed, as in the hypothetical case of the finder on the right of way discussed above, the questions would be (a) whether *Bridges v. Hawksworth* was rightly decided and applicable in this situation and (b), if so, whether property can be said to belong to P as against D, who has a better right to possession of it but takes it dishonestly, neither P nor D being the owner in the strict sense. A recent case suggests that, even if the court answered the first question in the affirmative, it would uphold a conviction by answering the second question also affirmatively.

In *Turner* (No. 2)⁴⁶ the appellant took his car to Brown's garage to be repaired. When the work was done, he told Brown that he would return the next day to pay for it and collect the car. A few hours later, however, without telling Brown, he took the car from where it had been parked in the road near Brown's garage. Brown reported the loss of the car to the police but subsequently discovered it near Turner's home. Turner first denied all knowledge of the incident but later admitted taking the car without paying, having, he said, Brown's consent to do so. Among many points taken at the trial, Turner set up the defence that he was not dishonest—that he believed he had a right in law to do what he did. The judge gave a "classic direction" on the question of claim of right and the jury by their verdict of guilty thus plainly found it proved beyond reasonable doubt that the accused acted dishonestly. The case thus presents no problem regarding *mens rea*. On the facts

⁴⁶ [1971] 2 All E.R. 441.

there seems to be no problem about the *actus reus* either. Brown not only had possession of the car but also, surely, a lien on it for the cost of the repairs; and nothing is clearer than that the owner of goods may steal them from one who has possession and the right to retain possession even against the owner. However, the judge directed the jury that they were not concerned with liens and the sole question was whether Brown had possession or control. Since the jury were directed not to consider the question it could not be said that a lien had been established and it was argued on appeal that, in default of proof of a lien, Brown was merely a bailee at will and accordingly had not sufficient possession.

It is said . . . that while Mr. Brown may have had possession or control in fact, that is not enough, and that it must be shown before it can be said that the property "belonged to" Mr. Brown, those being the words used in section 1 (1) of the Theft Act 1968 that that possession is, as it is said, a right superior to that in Mr. Brown (*sic*: presumably "Mr. Turner" is meant).⁴⁷

The court would have none of this argument. "This court is quite satisfied that there is no ground whatever for qualifying the words 'possession or control' in any way. It is sufficient if it is found that the person from whom the property is taken, or to use the words of the Act, appropriated, was at the time in fact in possession or control."⁴⁸ The court thus seems prepared to accept that Turner may have had the right to resume possession of the car at the time when he did so; but, because he was, as the jury had found, dishonest and did not actually believe he had a right, he was guilty of stealing. It certainly looks very odd that a man who has done no more than exercise his civil law rights in relation to a chattel should be guilty of stealing it. *Turner's case* may have been coloured by the fact that there can scarcely have been any real doubt that Brown had a lien—that Turner did *not* have a right to re-take the car: the case had to be decided on a fictitious supposition which probably no one concerned in it really believed in; and the reluctance to acquit a man proved to be dishonest is, in these circumstances, understandable. Suppose, however, that D's car is stolen by P. D reports the loss of the car to the police but later finds it standing outside P's house. Of course, D has a right simply to resume possession. Suppose he does not know this and thinks a court order is necessary before he can have his car back. Believing that he has no right in law to do so, D takes the car from P's possession. According to *Turner*, he is guilty of theft of the car. P, the thief, is undoubtedly in possession of the stolen car and, so we

⁴⁷ At p. 442.

⁴⁸ At p. 443.

are told, the word "possession" cannot be qualified in any way, so the car belongs to P, the thief, even as against the true owner, D. This does not seem right. Perhaps the practical importance is not great; people who have an actual right to take possession of property will generally know this, so there will be no question of dishonesty. But the position will not always be so clear as in this hypothetical example. If the thief has sold the car to a bona fide purchaser, the original owner will generally have a right simply to take it back but he may very well be unaware of this; and the bona fide purchaser will certainly believe that he is the victim of theft if the car is simply removed without his consent. *Turner* suggests that if he were to prosecute the owner for theft he would succeed. The incongruity of this becomes apparent if one supposes that the magistrates were to be asked to exercise in favour of the bona fide purchaser their power (the facts being clear—*cf.* section 28 (4)) to order the car to be restored to the person entitled to it. The answer would of course be that the convicted thief, was and always had been, the person entitled to the possession of the car.

It is true that it is reasonably clear that, under the Theft Act, a person may be guilty of blackmail even though he is entitled to have the property he demanded.⁴⁹ A creditor may be guilty of forgery if he uses a false document to deceive the debtor into paying, even though the debt is due in law.⁵⁰ The owner of land may be guilty of the crime of forcible entry even though he was entitled in law to enter upon and recover possession of the land in question.⁵¹ These are, however, all cases where the gist of the offence lies in the means used—the menace, the forged document, the force. The case put is different for there appears to be nothing of an illegal nature in the means used to re-assert the proprietary right. *Turner* perhaps goes too far.⁵²

⁴⁹ Theft Act 1968, s. 21 (1); Smith, *Law of Theft* [428]–[432].

⁵⁰ *Parker* (1910) 74 J.P. 208.

⁵¹ Statutes of Forcible Entry, 1381–1623; *Russell on Crime* (12th ed.), Chap. 15.

⁵² One solution to the case of the dishonest man who, unknown to himself, has done no more than assert a legal right is to hold him guilty of an attempt. In these cases he is making a mistake of law. Mistake as to the criminal law is not generally a defence to a charge of crime, but it is thought that mistakes of the civil law may sometimes indirectly amount to defences by precluding the accused from having *mens rea* in acting as he did: Smith & Hogan, *Criminal Law* (2nd ed.), pp. 48–51. We are here concerned with the converse situation. D has *mens rea* because he is mistaken as to the civil law. A mistake as to the criminal law should certainly not result in a conviction. For example, D, who believes that it is an offence to have sexual intercourse with girls under the age of eighteen, has intercourse with P whom he knows to be only seventeen. He can scarcely be convicted of attempting to have intercourse with a girl under the age of sixteen. The offence would have to be described as attempting to have intercourse with a girl under the age fixed by statute. This would be a new departure and an unnecessary and undesirable one. (*Cf.*, however, Brett, *An Inquiry into Criminal Guilt*, pp. 125–129.) Less objectionable, however, is the

Conflicts of contractual rights and criminal duties

It is in relation to obtaining property or a pecuniary advantage by deception that the interaction of the civil and criminal law is likely to present the most acute problems. These offences are commonly committed in the course of the negotiation of contracts. If the civil law is that the transaction has resulted in a perfectly valid contract under which one party could sue the other for property or a "pecuniary advantage," it is impossible for the criminal law to say that that property or pecuniary advantage has been obtained by deception. Here the contractual right is a right *stricto sensu*⁵³ and not a mere liberty or privilege. An obvious example is the kind of situation that arose in the case of *Smith v. Hughes*,⁵⁴ assuming that celebrated case to be still good law.⁵⁵

D, a farmer, asked P, a trainer of racehorses, if he would like to buy forty or fifty quarters of oats and showed him a sample. P said he would take the whole quantity and D delivered a portion of it. P complained that the oats were new oats whereas he thought he was buying old oats. There was a dispute as to whether the word "old" was used, which was not resolved by the jury's verdict. The Court of Queen's Bench decided that, if the word "old" was not used, D was entitled to recover the price even if he knew at the time of the contract that P believed the oats to be old and that they were in fact new.

Cockburn C.J. recognised⁵⁶ that "a man of tender conscience or high honour would be unwilling to take advantage of the ignorance" of the other party in a case of this kind, and it would certainly not be unreasonable to regard D's conduct as dishonest. It was suggested when the reform of the law of theft was under consideration that similar conduct should amount to obtaining by deception.

case where the accused's mistake relates not to the nature of the criminal offence but to a rule of the civil law. An example is *Deller* (1952) 36 Cr.App.R. 184. Deller who had purported to mortgage his car then induced P to buy it by representing that it was free from encumbrances. Unknown to Deller, it was free from encumbrances since the mortgage, being an unregistered bill of sale, was void. His conviction for obtaining was quashed. There was no false pretence. Recent cases (though on very different facts) suggest that he might have been convicted of an attempt: *Millar and Page* (1965) 49 Cr.App.R. 241; *Crispin* [1971] Crim.L.R. 229. The overpaid punter is in a similar situation if he believes he under a legal obligation to repay. So, clearly, was Turner. A conviction for attempt avoids some of the objections to a conviction for the full offence. The Criminal Court no longer asserts that the actual situation amounts to an offence but that the situation would have amounted to an offence had it been as the accused believed it to be.

⁵³ See Dias, *Jurisprudence* (3rd ed., 1970), pp. 248 *et seq.*; Salmond, *Jurisprudence* (12th ed., 1966), p. 224.

⁵⁴ (1871) L.R. 6 Q.B. 597.

⁵⁵ The writer has some difficulty in seeing how it can stand if *Solle v. Butcher* [1950] 1 K.B. 671, and *Grist v. Bailey* [1967] Ch. 532, are rightly decided.

⁵⁶ At p. 604.

Whether such "passive acquiescence in the self-deception" of another could be held to amount to deception by conduct is doubtful but certainly arguable; but a holding that it constituted an offence would be incongruous in the extreme when viewed in the light of the civil law. The civil court, in allowing D to recover the price would be assisting him to obtain what, according to the criminal court, would be the proceeds of his crime. This would be an absurdity which the courts could scarcely allow. Either the criminal court would have to construe the statute in the light of the civil law and hold that, since the transaction gave P an actual right to recover the money, it could not constitute an offence of obtaining it; or the civil courts would have to hold that the civil law had been altered by the criminal law. It is thought that the former of these two courses would be right in principle. It is true, of course, that statutes creating criminal offences affect the civil law. A statute prohibiting a particular result invalidates any contract to bring about that result. But the law of theft and associated offences assumes the existence of a body of civil rights and duties; it exists to protect those rights and it is the business of the criminal courts to protect them, not to change them.

Attention must now be directed to a case in which the court seems to have done just what the last paragraph asserted the courts could not possibly do. If it did so, it was unwitting; and, remarkably, it was the Court of Appeal sitting in a civil case which decided the point of criminal law. The case in question is *Berg v. Sadler and Moore*.⁵⁷

The plaintiff had been a member of the Tobacco Trade Association one of the objects of which was to prevent price cutting and to secure price maintenance. Having been found to be price cutting, the plaintiff was put on the Association's stop list, so that he was unable to obtain supplies of cigarettes. The plaintiff met one Reece who was a member of the Association. Through Reece, the plaintiff obtained a large supply of cigarettes from the defendants. Reece, accompanied by the plaintiff's wife, bought the cigarettes ostensibly on his own behalf with money supplied by the plaintiff. It was proposed to repeat the transaction and Reece ordered cigarettes to the value of £72 10s. The plaintiff sent his representative with the money, accompanied by a representative of Reece. The money was handed over but the defendants then became suspicious and refused to deliver the cigarettes or return the money. The plaintiff sued to recover his money and Macnaghten J. and the Court of Appeal held that the action failed on the ground that the claim could not be established without disclosing facts which showed that the plaintiff was engaged

⁵⁷ [1937] 2 K.B. 158. The case was criticised on similar grounds by C. K. Allen in 54 L.Q.R. 201.

in a criminal attempt to obtain goods by false pretences. It was thus part of the *ratio decidendi* of the court that the conduct in question amounted to a crime.

The difficulty about this is that this case appears scarcely distinguishable from civil cases where the person in the position of the plaintiff has been held to have made an enforceable contract. If the facts are looked at in the terms of the civil law. It would seem that Reece was buying the cigarettes as agent for an undisclosed principal, Berg. Alternatively, though less probably, Reece was buying the cigarettes in order to resell them to Berg. In *Dyster v. Randall and Sons*⁵⁸ the plaintiff wished to purchase two plots of land from the defendants. He had formerly been employed by the defendants but had been discharged by them in circumstances which to his knowledge caused the defendants profoundly to distrust him and to render it certain that they would not enter into any further business transaction with him. The plaintiff therefore procured a friend, Crossley, to buy the plots for him without disclosing the fact that he was acting as his agent. The defendants contracted to sell the plots to Crossley. It was a term of the contract that the purchaser should submit plans of buildings to be erected on the site to the vendor's architect. Dyster, however, began building without submitting any plans and the defendants protested to Crossley who, finding himself in a difficult situation, disclosed the true position to the defendants and asked to be released from the contract. The defendants and Crossley, without the plaintiff's authority, thereupon purported to cancel the contract. The plaintiff brought an action for specific performance. The defendants pleaded, *inter alia*, that the plaintiff had deceived the defendants in regard to the person with whom they were contracting. Lawrence J., however, held that since the agreement was not one in which any personal qualifications possessed by Crossley formed a material ingredient and since there was no direct misrepresentation, the plaintiff was entitled to specific performance. While the essential facts are very similar to those of *Berg v. Sadler and Moore*, the result is strikingly different. Conduct which is held to constitute a serious criminal offence in the one case gives rise to a contract of which the court is willing actually to decree specific performance in the other. Since land may now be the subject of obtaining by deception, the question could arise whether one acting exactly as did Dyster would be guilty of an offence under section 15 of the Theft Act. If, however, the cases are indeed indistinguishable in point of principle, one or other of them must be held to be wrongly decided. Unlike the absurdity which worried

⁵⁸ [1926] Ch. 932.

Atkin L.J. in *Lake v. Simmons*,⁵⁹ this conflict is one with practical effects in the law; and it would bring the law into contempt if one court were to order the conveyance of land which another court held to be thereby obtained by deception.

Lawrence J. said:

In my judgment mere non-disclosure as to the person actually entitled to the benefit of a contract for the sale of real estate does not amount to misrepresentation, even though the contracting party knows that, if the disclosure were made, the other party would not enter into the contract; *secus*, if the contract were one in which some personal consideration formed a material ingredient: see *Nash v. Dix* and *Said v. Butt*.⁶⁰

Are the cases distinguishable? Lawrence J.'s statement of principle, quoted above, is confined to sales of realty; but it can hardly be supposed that there is a higher duty of disclosure on a contract for the sale of goods such as cigarettes than on a contract for the sale of land. A more promising line of argument might be based on the "personal considerations" point. Crossley had no peculiar qualifications to be considered a suitable purchaser, except that he was not Dyster. Had Reece any qualification other than that he was not Berg or some other person whose name was on the stop list? That there were others (presumably) on the stop list would not seem to be significant for there may, for all that appears, have been other persons to whom Randall and Sons would not have been willing to sell the plots of land. It is possible (though it does not appear in the report) that Sadler and Moore dealt only with members of the Tobacco Trade Association and Reece was a member. If a seller makes known to prospective buyers that he is willing to sell only to persons belonging to a particular class, his "invitation to treat" is addressed to that class only and the offeror who knows or ought to know of this limitation cannot simply ignore it. Since this point was not considered in the judgments, however, it can hardly be a satisfactory ground of distinction. The nature of the alleged false pretence did not receive any consideration from the Court of Appeal who presumably accepted Macnaghten J.'s view. He said:

It is strenuously argued that there was no false pretence. It is a bold argument. [Berg] sent his servant, the hairdresser, to get the goods, knowing that if Berg went he could not get them, knowing that if his servant disclosed the fact that he was his

⁵⁹ Above, p. 212.

⁶⁰ At p. 939. The cases quoted do not say that there is *misrepresentation* where personal considerations are present, only that the alleged undisclosed principal may not intervene. *Said v. Butt* [1920] 3 K.B. 497 (McCardie J.) was a case of a sale of a theatre ticket for a first night performance. It was well known to the plaintiff, who unsuccessfully claimed to be an undisclosed principal, that the management only disposes of such tickets to those whom it selects.

servant, he could not get them. He sent his servant, the hairdresser, to pose as the agent of Reece, to pay the money as the agent of Reece, and the hairdresser maintained the character in which he was intended to appear. He never told Mr. Moore or Mr. Moore's clerk: "I am not Mr. Reece's servant. This is not Mr. Reece's money; it belongs to Mr. Berg."⁶¹

The false pretence is plainly put on the ground of non-disclosure of the fact that the goods were destined for Berg and that Berg was paying for them. But every agent for an undisclosed principal omits to disclose precisely the same facts.

If the alternative view be taken of *Berg v. Sadler and Moore*—that it was a case of a purchase by Reece as a principal with a view to re-sale to Berg—the argument for invalidating the contract is weaker and again there is authority against it. In *Nash v. Dix*⁶² the defendants were the trustees of a congregational chapel which they advertised for sale. A committee of Roman Catholics who wanted to use the building as a place of worship made an offer which the trustees refused because they did not wish the building to be used for that purpose. The committee then told the plaintiff that if he would purchase the property, they would buy it from him at £100 profit. The plaintiff's solicitors made an offer to the trustees on behalf of their client, "the manager of the Epping Natural Mineral Waters Company Ltd." After some negotiations, the trustees entered into a contract to sell the chapel to the plaintiff. The committee had already paid the plaintiff £100 and given him a written guarantee that they would pay him the price of the chapel. The trustees discovered the truth and refused to complete. North J. gave the plaintiff a decree for specific performance. The judge found that the plaintiff was buying, not as agent for the committee, but on his own account with a view to resale to the committee. He found it unnecessary to decide what the position would have been had plaintiff been buying as agent.

Both *Dyster v. Randall and Sons* and *Nash v. Dix* depend on the fact that there was no express misrepresentation. The judge in each case distinguished *Archer v. Stone*,⁶³ another decision of North J., where Stone, the owner of a leasehold shop, was unwilling to sell it to one Smith, as the plaintiff, Archer, knew. Stone asked Archer, "You are not purchasing on behalf of Smith?" and Archer replied, untruthfully, that he was not. Archer's action for specific performance was dismissed. The distinction is essentially the same as that taken in *Smith v. Hughes*. If the plaintiff in that case had said that oats were old or done anything to lead the defendant to believe that the oats were old, he would have been guilty of fraud. *Nash v. Dix* and

⁶¹ [1936] 2 All E.R. 456 at p. 461.

⁶² (1898) 78 L.T. 445.

⁶³ (1898) 78 L.T. 34.

Dyster v. Randall and Sons go farther than *Smith v. Hughes* which was a simple case of passive acquiescence in self-deception. The two former cases both involved a deliberate agreement between A and P to get property from its owner, T, by concealing the truth that A was acting on behalf of P. From a moral point of view, the distinction between that and the case of the direct lie is marginal. If the judges had decided that such conduct amounted to fraud, this would certainly have been a tenable point of view; and if it were fraud in the civil law then it might be reasonable to go further and hold such conduct to be criminal.

There was no possibility of criminal liability in either *Nash v. Dix* or *Dyster v. Randall and Sons* at the time they were decided, since an interest in land could not be the subject of obtaining by false pretences. That is no longer a bar to criminal liability and the questions now are whether such behaviour constitutes a deception by conduct and whether the buyer is acting dishonestly. *Berg v. Sadler and Moore* gives an affirmative answer and, if it is to be followed, *Nash v. Dix* and *Dyster v. Randall* must surely be regarded as wrongly decided. It is submitted, however, that *Berg v. Sadler and Moore*, though a decision of the Court of Appeal, is the case which ought to be regarded as wrongly decided.⁶⁴ If the case were right there would be grave doubt whether many well-established cases of undisclosed agency could be upheld, and the rules of the civil law ought not to be upset by a decision on a point of criminal law.⁶⁵ It is very doubtful, moreover, whether essential features of a deception were present in the case. It does not appear that the question of the ultimate destination of the goods was present to the seller's mind at the time of the agreement for sale or that the buyer thought it was present to his mind.

Conclusions

1. It is over-optimistic to suppose that the interpretation of the Theft Act can be kept free from the distinctions, including the finer distinctions, of the civil law.

⁶⁴ C. K. Allen's conclusion (54 L.Q.R. at p. 215) was that *Berg*, though not guilty of a criminal attempt, rightly failed in his action for money had and received on the principle of *ex turpi causa non oritur actio*. But this cannot be reconciled with *Dyster v. Randall & Sons*, unless the cases are distinguishable on the facts, for the plaintiff seeking specific performance must come with clean hands. See also Professor Goodhart's postscript at p. 216.

⁶⁵ *Nash v. Dix* and *Dyster v. Randall & Sons* are accepted as correct by the books on agency: see Powell (2nd ed.) 159-162; Bowstead (13th ed.), Art. 89; Fridman (3rd ed.) 191-192; Stoljar 224-228. See also Goodhart and Hamson (1932) 4 C.L.J. 320 at 347-348. Treitel, however, thinks that an undisclosed principal should not be allowed to intervene if he knows that the third party does not want to deal with him: *Law of Contract* (3rd ed.), p. 642. The principle of *Dyster's* case is generally accepted in America according to Ferson, *Principles of Agency*, section 183.

2. Civil law concepts should not be invoked in construing a criminal statute unless the context so requires or the purpose of the statute can best be fulfilled by doing so.

3. Merely verbal conflicts between the civil and criminal law should not deter the court, whether civil or criminal, from applying the principles and effectuating the policies appropriate to the branch of law in issue.

4. The criminal law may properly limit liberties or privileges allowed by the civil law; it is not necessary that every crime against the person or against property be also a tort or other civil wrong.

5. The criminal law must not impose duties which are inconsistent with rights, *stricto sensu*, or duties in the civil law. Such duties can be imposed only if the court is able and prepared to say that the civil rights and duties should no longer exist and the cases supporting them be overruled.

6. In the law of theft and related offences the civil law of property must be accepted as the essential background and *raison d'être* of the criminal statute which should not be so construed as to alter civil law rights.

"RISK" IN THE LAW OF SALE

L. S. SEALY

THE jubilee of the *Journal* happens to coincide with the centenary of *Head v. Tattersall*,¹ the well-known but troublesome case in which the buyer of a horse was allowed to exercise a contractual right to return it (for failure to answer a warranty² that it "had been hunted with the Bicester hounds"), despite the fact that it had been accidentally injured in the meantime and could be restored to the seller only in a damaged state. Most contract textbooks cite this as the classic instance of the *condition subsequent*, by virtue of which a contract or obligation, although initially effective, ceases to operate on the occurrence of a specified event. It is apparent, however, on closer analysis³ that it was not the *contract* or any aspect of it which was terminated because the horse failed to meet the warranty, but the buyer's *title*: in other words, the property in the horse passed to the buyer immediately, but defeasibly, so that when he rejected the horse he divested himself of the title and revested it in the seller. Even this explanation leaves on one side the question of the damage sustained by the horse. In the language of the law of sale, it would be most natural to regard this issue as one of risk, and to say that the court held in effect, and indeed perhaps expressly, that the horse was at the seller's risk during the period allowed for its return.

It is this concept of risk which forms the theme of the present article.

(1) *Property, possession and risk*

It is customary to speak of three stages, or incidents, in the performance of a contract of sale. These are the transfer of the property, the delivery of possession and the passing of the risk. The typical transaction begins with all three "interests" vested in the seller and is completed when all have passed irrevocably to the buyer. The respective transfers may take place simultaneously or in any sequence.

¹ (1871) L.R. 7 Ex. 7.

² "Warranty" is here used in a general sense, without reference to the question whether the undertaking is so "essential" as to amount to a "condition" in the language of the Sale of Goods Act 1893.

³ See Stoljar, "The Contractual Concept of Condition" (1953) 69 L.Q.R. 485, 506-511.

The primary obligations of the seller as set out in the Act ⁴ are to transfer the property in the goods (section 1) and to deliver them to the buyer (section 27); the buyer for his part must accept the goods and pay the price (section 27).⁵ The duties to deliver and to accept are naturally correlative, and actions for damages lie for their non-performance (sections 50, 51). The obligations to transfer title and to pay the price are also correlative, as appears from the language of section 1; and although as an immediate and practical question the price may be payable in exchange for the delivery of possession rather than the transfer of property,⁵ in the ultimate analysis it is the property alone which counts: for if the buyer fails to get a good title, he may claim the return of his price on the basis of a total failure of consideration, whether he has had the possession and use of the goods or not.⁶

Such are the primary obligations of the parties. It may seem surprising that there is no mention of risk in this context, either in the statute or the textbooks. It is not usual to speak of any duty, or even a right, on the part of the seller to transfer "the risk," or of any obligation (still less right) on the part of the buyer to accept it. There is no action for failure to transfer or to accept it. Up to a point this may be explained by the fact that the incidence of the risk is determined as a matter of law, and does not depend on the acts or intention of the parties except in the sense that they may agree to vary the legal rules. But to a greater or less degree the same is true also of property and even, in difficult instances, of possession: the "passing" depends in each case on a mixed question of law and fact to which not only the theoretical rules but also the terms of the bargain between the parties and subsequent acts of appropriation, attornment and so on may be relevant. The truth is that risk is a derivative, and essentially negative, concept—an elliptical way of saying that either or both of the primary obligations of one party shall be enforceable, and that those of the other party shall be deemed to have been discharged, even though the normally prerequisite conditions have not been satisfied. That is to say, the legal consequences attaching to "the risk" fall to be defined purely in terms of the parties' other duties and the corresponding rights and remedies: the seller's right to claim the price, and the buyer's right to resist payment or to demand its return; and the right to claim

⁴ All unspecified references are to the Sale of Goods Act 1893. The same obligations are stated more explicitly in the Uniform Commercial Code (U.C.C.), § 2-301.

⁵ s. 28. The practical significance of the incidence of the property is limited in other ways: see Lawson, "The Passing of Property and Risk in Sale of Goods" (1949) 65 L.Q.R. 352, and Atiyah, *Sale of Goods* (4th ed., 1971), p. 139.

⁶ *Rowland v. Divall* [1923] 2 K.B. 500.

damages (e.g., for non-delivery or non-acceptance⁷) or to resist such a claim.

Opinions differ as to the need for a concept of “property” in a code of sales law, and in the United States a successful attempt has been made to manage without it. It might be considered that in English law we could dispense with the notion of risk, or at least regard it merely as a convenient, if somewhat vague, shorthand expression for what must ultimately be explained in other terms. This is, on the whole, true; and we shall see that while in cases like *Head v. Tattersall* it may throw fresh light on a problem to see it as a question of risk, in more difficult situations the converse applies—the courts have been driven to seek a solution by scrutinising and defining more precisely the terms of the primary obligations rather than by having regard to the risk issue. On at least one ground, however, the case for a separate concept of risk may be supported. Perhaps because its operation concerns only the parties themselves and does not affect the rights of third persons (other than insurers) the courts have allowed it to develop a degree of flexibility and divisibility which they have traditionally denied to “property” and “possession.” If A owns fifty tons of corn stored in bulk he cannot, without appropriation, make B the owner or possessor of twenty tons and C the owner or possessor of the remaining thirty; but neither the common law nor the Act stands in the way of their sharing the risk in proportion to their respective interests.⁸

There is also a practical reason for thinking in terms of risk. It is a simple word which the business man uses intuitively and readily, without any direction or help from the law. It may, indeed, be a vain exercise to seek to explain it in terms of lawyers’ concepts which he would understand imperfectly, and of forensic consequences which he would prefer to avoid. Although it is precisely such an exercise which is undertaken in this article, the reminder is perhaps timely; and so let us first begin with the merchant and look at the problem through his eyes, asking in concrete terms the question—risk of what?

(2) *The meaning of “the risk”*

“The risk” is referred to in four sections⁴ of the Act. A definition was apparently thought unnecessary, but we may glean something from the context in which the expression is used on these four occasions. Section 7 provides for the avoidance of an agreement to sell specific goods which, “without any fault on the part of the seller or buyer, perish before the risk passes to the buyer.” It is not an

⁷ In a case of deterioration, the question may arise as one of breach of warranty of quality, as in *Sterns Ltd. v. Vickers Ltd.* [1923] 1 K.B. 78.

⁸ See below, § 4.

unreasonable inference that if the risk *has* passed to the buyer, such "perishing" is something which he has to accept. Section 20 states that, unless otherwise agreed, "the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not"; and in a proviso there is reference to the risk "as regards any loss." Section 32 (2) deals with goods "lost or damaged in course of transit" without using the word "risk," while in rather curious contrast section 32 (3) speaks of "risk during . . . sea transit" without reference to "loss or damage." Finally, section 33 distinguishes between "the risk," which may be assumed by the seller during delivery, and "any risk of deterioration in the goods necessarily incident to the course of transit," which must be borne by the buyer. If we infer from all this that "the risk" is "the risk that, without any fault⁹ on the part of the seller or buyer, the goods may perish¹⁰ or be lost or damaged," we shall not be far from what has been established by the decided cases, before and since the Act; and if we read into section 33 that "the risk" may or may not include cases of deterioration, that, too, is about as far as the decisions take us.

There are, of course, many risks run by a party to a contract of sale—risks as to the honesty or the solvency of the other party, the risk of an adverse swing in the market, and the risk of a change of circumstances (whether foreseen or not) such as the outbreak of war or the failure of a source of supply. The very words *caveat emptor* indicate that the buyer takes upon himself all risks as to the quality and fitness of the goods, except of course those for which the seller assumes responsibility by giving warranties, express or implied. (Sections 10–15 of the Act might be rewritten quite intelligibly in terms of risk—"the risk" that the seller's title may prove defective, and so on.) There is, as we shall see shortly, an inevitable overlap between the implied terms as to quality and the risk of deterioration, but subject to this qualification it may be said that "the risk" to which the statute and the business man refer has nothing to do with various "risks" just described, for in their terms it is the *goods* which are at the risk of a party and not the financial or other aspects of the bargain.

The central notion, as is borne out by the cases, is that of loss, and incidentally of damage or deterioration resulting in partial loss. As instances of events which have been held to come within "the

⁹ Not necessarily of course in the statutory sense of "wrongful act or default" (s. 62 (1)): see below, p. 247.

¹⁰ Decisions on the meaning of "perish" for the purposes of ss. 6 and 7 may be helpful, but will not be conclusive, in "risk" cases, since the latter expression is plainly wider.

risk" we may cite a cargo which sinks,¹¹ a horse which dies¹² or is accidentally injured¹³ or afflicted with disease,¹⁴ goods lost in a warehouse fire,¹⁵ a car which is damaged by a stranger,¹⁶ and spirit adulterated by the admixture of an inferior liquid.¹⁷ There is little doubt that loss by theft is included.¹⁸

The risk of goods *deteriorating* is not a simple concept.¹⁹ If the deterioration follows from accidental damage it is no doubt indistinguishable from a case of such damage *per se*. Deterioration from *delay* due to the fault of a party is the subject of special provision in section 20 of the Act: it probably follows that deterioration from delay without fault is within "the risk," even though this is probably not true of delay as such which otherwise prevents due performance.²⁰ Deterioration which is natural to the class of goods sold, or necessarily incidental to such storage or transit as the contract contemplates, is (agreement apart) something which the buyer must accept, while deterioration attributable to inherent faults or unusual characteristics in the goods calls primarily for consideration of the question whether the condition or quality of the goods has been warranted, and the period or point of time to which such warranty relates.²¹

The loss or damage contemplated by "the risk" may affect all or some only of the contract goods. It is not necessary that the goods should be "specific" either within the statutory definition (section 62 (1)) or in the wider common law sense.²² In particular, the risk may be transferred in an undesignated part of a specific bulk,²³ and in goods "appropriated" to answer a contract by a unilateral act of the seller which does not amount to an "appropriation" for the purpose of transferring the property.²⁴ Indeed, although it may seem nonsense to speak of the "passing" of the risk in goods which the seller does not own, and even more so in goods which have ceased

¹¹ *Inglis v. Stock* (1885) 10 App.Cas. 263.

¹² *Elphick v. Barnes* (1880) 5 C.P.D. 321; *Chapman v. Withers* (1888) 20 Q.B.D. 824, 826.

¹³ *Head v. Tattersall* (1871) L.R. 7 Ex. 7; *Chapman v. Withers* (*supra*).

¹⁴ *Elphick v. Barnes* (*supra*).

¹⁵ *Rugg v. Minett* (1809) 11 East 210.

¹⁶ *Poole v. Smith's Car Sales (Balham) Ltd.* [1962] 1 W.L.R. 744.

¹⁷ *Sterns Ltd. v. Vickers Ltd.* [1923] 1 K.B. 78.

¹⁸ *Bevington v. Dale* (1902) 7 Com.Cas. 112; but *cf.* Atiyah, *Sale of Goods*, p. 42 (do they "perish"?).

¹⁹ Sassoon, "Damage Resulting from Natural Decay" (1965) 28 M.L.R. 180; Atiyah, *op. cit.*, p. 123.

²⁰ See below, p. 231.

²¹ Sassoon, *op. cit.*

²² *e.g.*, as coming from an identified source: *Howell v. Coupland* (1876) 1 Q.B.D. 258.

²³ See below, § 4.

²⁴ *Demby, Hamilton & Co. Ltd. v. Barden* [1949] 1 All E.R. 435. But such an act of appropriation will not necessarily *pass* the risk: for example, in a c.i.f. contract, risk will as a rule pass on or as from shipment, but the "notice of appropriation" may be given at an earlier date.

to exist, it has been recognised that under some forms of contract a seller may legitimately appropriate to the contract goods which have already been lost, perhaps even lost to his knowledge.²⁵

"The risk" is undoubtedly thought of in terms of loss or damage to the goods themselves, excluding consequential losses. If a motorist buys from a garage a gallon of petrol which explodes in his tank, the question of risk will determine which party should stand the cost of the lost gallon, but not the further issue of the responsibility for the car and the petrol pump, if both are damaged by the explosion. There appears, however, to be no authority on this point, or on the similar question whether the party who has the risk must bear the cost where the goods are the subject of interference or disturbance which occasions expense without damage: for example, if a breakdown in transport necessitates transshipment, or if livestock escape or are turned loose by vandals during transit.²⁶

Does "the risk" contemplate only *accidental* loss or damage? Plainly, the term covers more than "accidental" loss in the sense used by insurers, for it includes loss through inherent propensities such as death and disease of animals and the rotting of perishable commodities.²⁷ Injury caused by the unauthorised act of a stranger is within "the risk,"²⁸ but authorised acts are probably not—as, for instance, where the goods are sold by a sheriff²⁹ or ship's master³⁰ acting under a lawful power.

The relevance of *fault* on the part of one or other party raises difficult questions, some of which are discussed in § 11 below. There may also be occasions where the *lawful* act or election of a party has the consequence of shifting the risk on to that party's own shoulders, especially in the case of goods delivered on sale or return.³¹

So far, it may be fairly confidently assumed that our definition or description of "the risk" would meet with the approval both of the reasonable merchant and of the statutory draftsman: the emphasis is upon physical loss or damage which occurs without fault. Such loss or damage will usually mean that the goods cannot be delivered as promised under the contract; and indeed the expression commonly used in the early books and cases is "risk of non-delivery." But it

²⁵ See n. 1 below, p. 241.

²⁶ A party who had the risk but neither property nor possession would have no power to sue the wrongdoers, but this is immaterial: see *Margarine Union G.m.b.H. v. Cambay Prince S.S. Co.* [1969] 1 Q.B. 219.

²⁷ See above, notes 12–14; *Demby Hamilton & Co. Ltd. v. Barden* [1949] 1 All E.R. 435; and *Horn v. Minister of Food* [1948] 2 All E.R. 1036.

²⁸ *Poole v. Smith's Car Sales (Balham) Ltd.* [1962] 1 W.L.R. 674.

²⁹ The seller would surely be held liable under s. 12.

³⁰ Contrast *Couturier v. Hastie* (1856) 5 H.L.Cas. 673 and *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v. Lijs de Ridder Lda. (The Julia)* [1949] A.C. 293, where the master's act followed upon an event respectively within and outside the normal "risk."

³¹ *Genn v. Winkel* (1912) 107 L.T. 434.

cannot be assumed that this expression is exactly equivalent to "the risk." In some ways it is too narrow, for disputes may arise over the risk *after* delivery has been effected, as in *Head v. Tattersall* itself, or under section 32 (3). Moreover, non-delivery may be due to events beyond the control of the parties which do not involve physical damage to the goods, for example, a change in the law,³² or enemy occupation of the port of discharge.³³ What would be the position if a ship³⁴ or building³⁵ is destroyed, or a person dies, whose continued existence is vital to the performance of the contract of sale; or if the contemplated source of supply unexpectedly fails³⁶; or if the goods are requisitioned³⁷ or condemned as prize³⁸; or if they suffer delay in transit, whether temporary or indefinite? The decided cases leave it quite uncertain whether any answer at all can be given to this question. It may be that the cases are not all *eiusdem generis*. In the case of mere delay not amounting to frustration, it is likely that the courts would disregard the issue of risk altogether and simply hold the seller to be in breach. In some of the other situations (e.g., requisitioning) the event might be construed as equivalent to a "loss" for risk purposes; but there is no reason why this should be so. In the words of Lord Normand,³⁹ "the agreement of the parties that the buyers should bear the risk of a loss against which insurance was provided for by the contract"⁴⁰ is not evidence of an intention that the buyers were also to take the risk of a frustration which was not within the contemplation of the contract."

It is obvious that if the burden of any such mishap does not go with the risk, it must fall on the party who has the property (or, if no goods are ever identified as the contract goods, on the seller⁴¹).

³² *Kursell v. Timber Operators & Contractors Ltd.* [1927] 1 K.B. 298.

³³ *Fibrosa Case* [1943] A.C. 32.

³⁴ *Nickoll & Knight v. Ashton, Edridge & Co.* [1900] 2 Q.B. 298.

³⁵ *Appleby v. Myers* (1867) L.R. 2 C.P. 651.

³⁶ *Howell v. Coupland* (1876) 1 Q.B.D. 258; *Re Badische Co. Ltd.* [1921] 2 Ch. 331.

³⁷ *Shipton Anderson & Co. Ltd. and Harrison Bros. & Co. Ltd.* [1915] 3 K.B. 676.

³⁸ *The Odessa* [1916] 1 A.C. 145; *The Parchim* [1918] A.C. 157. Although the "enemy" character of a cargo is determined by the allegiance of the party who has the property and not that of the party who has the risk, this settles only whether the prize law operates, and does not mean that the former rather than the latter must bear the loss, or that condemnation is an event within "the risk."

³⁹ *The Julia* [1949] A.C. 293, 319. A similar view appears to have been taken by Scrutton L.J. (*obiter*) in *Kursell v. Timber Operators & Contractors Ltd.* [1927] 1 K.B. 298, 312.

⁴⁰ The scope of "the risk" and the insurance cover are unlikely to be co-extensive, since the latter will not include loss from natural causes or "inherent vice": see Sassoon, *op. cit.* (above, n. 19).

⁴¹ If no goods of the contract description have ever existed, the seller ought ordinarily to be liable in damages without reference to any question of risk: *McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377. It is submitted that an implied warranty that the goods have to the knowledge of the seller existed is logically presupposed by s. 7.

Professor Glanville Williams⁴² has advocated the view that the consequences of any frustrating event should be borne by the party who carries "the risk"; but this appears to run counter to such dicta as can be found, and also to the wording of section 20, which speaks of "the goods" being at risk, and not of performance or delivery. There appear to be two alternative possibilities: either that such consequences attach as a matter of law to ownership⁴³; or that "the risk" is an expression of variable meaning, capable by implication⁴⁴ of including (say) requisitioning, or not, in accordance with the intention of the parties⁴⁵—that it may mean different things in different contracts, or even at different stages of the same contract.

The question must await an authoritative ruling. In decided cases, it does not seem ever to have been squarely faced by the courts. Frequently, this has been because risk and property were at the relevant time in the same party (the seller), and the only issue to be determined was whether the contract had been frustrated, or avoided under section 7, so as to relieve him of liability in damages for non-delivery.⁴⁶ There have, however, been a few cases in which the issue between the parties could have been resolved by a ruling that "the risk" was not to be construed so as to include a special event other than physical loss; and it is perhaps significant that the courts appear to have avoided this question and to have concentrated instead on the primary undertakings of the parties. The most important of these is *The Julia*,⁴⁷ where a contract for the sale of a quantity of rye was expressed to be on c.i.f. terms but also provided for delivery to be made at Antwerp. The buyer had in fact paid against a delivery order when Antwerp became an enemy port, and delivery in terms of the contract was no longer possible. The delivery order was incapable of passing either property or possession, since the quantity was part of a larger bulk and there could be no appropriation until delivery; but on the authorities⁴⁸ the risk might be presumed to have passed. The issue of risk was, however, brushed aside, and the question whether or not there had been total failure of consideration decided by focusing attention wholly on the nature of the seller's undertaking: "the vital question in the present case . . . is whether the buyers paid for the documents as representing the goods or for the

⁴² *Law Reform (Frustrated Contracts) Act, 1943* (1944), 84.

⁴³ This view is supported by the dictum of Scrutton L.J. (above, n. 39).

⁴⁴ Of course, it is possible for the parties to make *express* provision for the allocation of "extra" risks and even for their "passing" from seller to buyer; but this raises no problem.

⁴⁵ This view is perhaps supported by the dictum of Lord Normand (above, n. 39).

⁴⁶ e.g., *Nickoll & Knight v. Ashton, Edridge & Co.* [1900] 2 Q.B. 298; *Re Shipton Anderson & Co. and Harrison Bros. & Co.* [1915] 3 K.B. 676; *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.* [1962] A.C. 93.

⁴⁷ [1949] A.C. 293.

⁴⁸ See below, § 4.

delivery of the goods themselves."⁴⁹ The ruling was that on its true construction the contract was on "arrival" and not on c.i.f. terms, so that the buyers succeeded.

Another type of "event" which is similarly capable of being ruled (either as a matter of law or as one of construction) to be outside "the risk" is that the goods may never come into existence, or may have ceased to exist *before* the making of the contract of sale.⁵⁰ The well-known cases of *Howell v. Coupland*⁵¹ and *Couturier v. Hastie*⁵² may be taken respectively as examples. Since it is unnatural to speak of risk "passing" in relation to potatoes not yet grown,⁵³ it would plainly require very clear words to give a contract this effect. That is to say, the chance of such an event is something outside any normal definition or conception of "the risk." It is not unknown, however, for goods already lost to be the subject of some mercantile sales,⁵⁴ or for "the risk" to be deemed to have passed *as from* shipment, which may be before the date of the contract. The decision in *Couturier v. Hastie* was that the bargain was for the purchase of "goods" supposed to exist, and not of "goods lost or not lost." It was accepted that the buyer had agreed to bear the risk of loss or damage, and that for anything short of a total loss this risk might relate back to the date of shipment; but the risk so undertaken did not cover the possibility that the goods had wholly ceased to exist when the contract was made. Once again, the court reached this conclusion by examining the terms of the bargain as a whole, and not by any ruling as to the scope of "the risk" as a matter of law.

It has been suggested above that "the risk" may mean different things at different stages of a contract. Certainly it is possible for a contract to be so construed that the risk passes in only a partial sense prior to complete performance, so that for a time it is shared between the parties. In the old case of *Calcutta Co. v. De Mattos*⁵⁵ there was a contract for 1,000 tons of coal to be shipped to Rangoon: half of the price was payable against shipping documents and the balance on delivery of the coal at its destination. The effect of the court's decision was that the seller's right to the first half of the price was unconditional when the documents were taken up; if no coal

⁴⁹ [1949] A.C. 293, 312, *per* Lord Porter.

⁵⁰ *A fortiori*, the purported present sale of goods which have never existed should raise no question of risk: see above, n. 41.

⁵¹ (1876) 1 Q.B.D. 258.

⁵² (1856) 5 H.L.Cas. 673.

⁵³ Note that the contract was for potatoes, and not for the crop as such, in whole or in part. But even if the contract *had* been for the crop, it was not wholly sown at the time.

⁵⁴ See n. 1 below, p. 241.

⁵⁵ (1863) 32 L.J.Q.B. 322. There is always an inherent contradiction in contracts which are in hybrid c.i.f.—"arrival" form: *cf.*, *The Julia* (above), and *Produce Brokers New Co. v. Wray, Sanderson & Co. Ltd.* (1931) 39 Ll.L.R. 257.

arrived, the seller stood to lose this sum. But the remainder of the price was at the seller's risk pending complete delivery at Rangoon. The risk of the venture as a whole was thus equally shared, subject to one further question as to which there was a division of opinion: had the seller assumed contractual liability for due delivery,⁵⁶ or merely agreed that part of the price should be payable on this contingency? In the absence of any claim for damages for non-delivery, the point was left open. This case demonstrates clearly that difficult cases can be resolved only by construing the contract as a whole, and that simple presumptions as to the scope and incidence of "the risk" offer no real guidance.

(3) *Separation of property and risk*

The prima facie rule is that risk attaches to ownership of the goods: "*res perit domino*, the old civil law maxim, is the maxim of our law, and when you can show that the property passed, the risk of the loss prima facie is in the person in whom the property is."⁵⁷ This was so far taken for granted in the earliest cases that the issue of risk seems never to have been raised or discussed separately from that of property: everything turned on the question whether property had passed.⁵⁸ But merchants naturally made express stipulations regarding the risk in their contracts, and to these the courts were sooner or later bound to give effect. In particular, in a group of cases decided about a hundred years ago it proved very convenient to seize upon such a provision when there was some uncertainty whether the property had passed. In *Castle v. Playford*,⁵⁹ a cargo of ice was shipped at the buyer's risk, but never arrived. The buyer was held liable to pay the price even though it was no longer possible to assess it by weighing during delivery as the contract had provided: an estimated price was substituted. Again, in *Martineau v. Kitching*,⁶⁰ sugar lying in the seller's premises at the buyer's risk was destroyed in a fire before delivery. Despite the court's doubts whether the property had passed, the seller's action for the price was successful.

In the century which has passed since these cases the courts have utilised the concept of risk not only where the parties have made express provision as to its incidence but also where there is an established trade custom relating to risk—especially the understanding

⁵⁶ Subject (at least nowadays) to the possibility of discharge by frustration (below, § 10).

⁵⁷ *Martineau v. Kitching* (1872) L.R. 7 Q.B. 436, 453-454.

⁵⁸ *Williston on Sales*, § 300, citing *Noy's Maxims* and *Rugg v. Minett* (1809) 11 East 210; cf. *Fragano v. Long* (1825) 4 B. & C. 219; *Logan v. Le Mesurier* (1847) 6 Moo.P.C. 116.

⁵⁹ (1870) L.R. 5 Ex. 165.

⁶⁰ (1872) L.R. 7 Q.B. 436.

that in f.o.b. and c.i.f. contracts risk normally passes on or as from shipment—and occasionally as a matter of pure inference. Such an inference may be drawn from the fact that one of the parties accepts responsibility for insuring the goods (although the insurance cover is unlikely to be co-extensive with "the risk"). The buyer will also be held fairly readily to have accepted the risk of loss where the seller has technically retained title but the goods have passed out of his effective control.⁶¹ One particular instance of this latter situation may occur where goods which form part of a particular bulk are lost or damaged before appropriation. This topic calls for closer examination.

(4) *Risk in an undivided quantity of goods*

The rule of English law that no property can pass in unascertained goods⁶² is probably not capable of qualification however specific the agreement of the parties to the contrary may be. Likewise, despite dicta in some cases,⁶³ it is improbable that there can be an attornment by a bailee as to an unidentified part of goods held by him in bulk, capable of effecting a "delivery" of that part to the buyer so that he has "possession" in any sense known to the law.⁶⁴ There is an obvious difficulty in allowing different persons to claim proprietary or possessory rights (which may be asserted against third parties) in unspecified parts of the same mass: none of them can point to a particular portion and say "this is mine" or "you caused me this injury." In the United States, the law has been allowed to develop by a conceptual leap at which the common law⁶⁵ balked, and to declare that, where an intention to pass property is clear, the buyer and seller should become co-owners of the mass.⁶⁶ English law has reached the same result—at least for many practical purposes *inter partes*—by allowing the risk in a specific bulk to be shared by or apportioned between those interested.

The first court to be faced with the situation was asked a deceptively easy question: did an insurable interest arise? In *Inglis v. Stock*,⁶⁷ sugar was shipped in bulk to satisfy more than one contract. The seller had obtained several bills of lading, each referring to specified bags, which would have enabled him to appropriate the

⁶¹ The importance of control has been emphasised in some cases, such as *Bevington v. Dale* (1902) 7 Com.Cas. 112; *Sterns Ltd. v. Vickers Ltd.* [1923] 1 K.B. 78; *The Julia* [1949] A.C. 293. Cf. Gutteridge, "Contracts and Commercial Law" (1935) 51 L.Q.R. 91, 121.

⁶² s. 16.

⁶³ e.g., *The Julia* [1949] A.C. 293, 312.

⁶⁴ There may, of course, be an estoppel as against the bailee himself.

⁶⁵ Equity was, in turn, balked: *Re Wait* [1927] 1 Ch. 606.

⁶⁶ Uniform Sales Act, s. 6 (2); U.C.C., § 2-105 (4).

⁶⁷ (1885) 10 App.Cas. 263.

sugar among the buyers by grouping the bills so as to meet the respective contract quantities. This he had not done when the cargo was lost. The court had little difficulty in ruling that each buyer had an insurable interest in the consignment, even before appropriation. The normal presumption in f.o.b. contracts—that risk passes on shipment—was thus applied to allow the partial risk in a bulk to pass. It is a necessary corollary that each buyer is liable to pay the price of his share of the goods if the whole consignment is lost, and that each must bear a rateable share of any loss which affects only a portion of the goods. It also follows that where part of the bulk remains undisposed of by the seller, he and the buyer or buyers may be held to share the risk in the goods as a whole. This was the situation in *Sterns Ltd. v. Vickers Ltd.*⁶⁸ where a buyer of white spirit stored in bulk postponed taking delivery to suit his own convenience, and was held bound to accept the deterioration which subsequently occurred.

Two cases in which the justice of the decision is obvious have therefore been resolved by holding that the risk in a specific bulk is divisible. Where the merits have been the other way, however, the courts have shown a marked reluctance to follow the lead thus given. In *Healy v. Howlett & Sons*,⁶⁹ a bulk consignment of boxes of fish missed the Holyhead boat at Dublin, and consequently the twenty boxes which were appropriated to the defendants' contract (at Holyhead, by a railway porter) arrived in London in no state for consumption. The court was emphatic that risk remained with property throughout, so that the loss fell on the seller. Attempts have been made to distinguish this decision from *Sterns Ltd. v. Vickers Ltd.* on the ground that in the latter there was a quasi-attornment by the bailee.⁷⁰ This argument has some merit, but the truth is that the court in *Healy's* case was unwilling to consider risk as a separate issue from property, or to equate it with the insurable interest which had been found to exist in *Inglis v. Stock*. We have also seen that in *The Julia*⁷¹ the issue of risk was brushed aside when a strict application of *Inglis v. Stock* would have caused the buyer to lose his price as a result of an event which the insurance did not cover.

There are certain difficulties inherent in the idea of a divisible risk. The several buyers of a cargo shipped in bulk may have to bear the consequences of a tort committed against the goods by the carrier or a stranger, when the only person competent to bring an action is the seller, who has the property, and he is not compellable

⁶⁸ [1923] 1 K.B. 78.

⁶⁹ [1917] 1 K.B. 337.

⁷⁰ Atiyah, *Sale of Goods* 163.

⁷¹ [1949] A.C. 293; above, p. 232.

to do so.⁷² Again, damage may not be discovered until after delivery, and it is unlikely to be distributed (in physical terms) rateably among the various consignments. There is then no obvious legal machinery for redistributing the loss equitably.

(5) *Right to benefits accruing*

A corollary to the rule that risk *prima facie* attaches to the ownership of goods is that any accretion or benefit to them also attaches.⁷³ But it would be dangerous to infer that the right to benefits necessarily or even presumptively goes with risk rather than property where the two are separated.⁷⁴ If the spirit in *Sterns Ltd. v. Vickers Ltd.*⁷⁵ had improved in quality through the admixture of a superior liquid, the seller would presumably have been powerless to prevent the buyer from claiming his share of the contents of the tank.⁷⁶ But if a specific cow has been sold and the seller has agreed to despatch it at his own risk to the buyer, he would surely have no claim to a calf born on the journey. There can be no other guide to the solution of this question than the presumed intention of the parties, having regard to all the circumstances.

(6) *Effect where buyer assumes risk*

The acceptance of the risk by the buyer means that he undertakes to discharge the obligations assumed by him even after the goods have been wholly or partially lost or damaged. It means also that he waives all claims and rights which arise from the non-performance by the seller of his obligations in so far as this is attributable to such loss or damage.⁷⁷ In the first place, he must pay the price.⁷⁸ He cannot refuse to pay, or claim the return of any money paid, on the ground that the seller is no longer able to transfer the property in the lost goods; in this respect it is immaterial whether delivery has been made or not. If the goods were to have been delivered in exchange for the price but have been lost, the buyer's assumption of the risk is a waiver of his normal right to require delivery as a

⁷² *Margarine Union G.m.b.H. v. Cambay Prince S.S. Co.* [1969] 1 Q.B. 219.

⁷³ *Sweeting v. Turner* (1872) L.R. 7 Q.B. 310, 313; *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex.D. 164, 169.

⁷⁴ Where the goods are hired, the benefits (at least in the case of livestock) belong to the hirer and not to the owner: *Tucker v. Farm & General Investment Trust Ltd.* [1966] 2 Q.B. 421.

⁷⁵ [1923] 1 K.B. 78.

⁷⁶ He could, of course, simply break the contract if it would pay him to do so.

⁷⁷ The seller is sometimes said to be discharged by impossibility of performance: see the discussion of *Rugg v. Minett* (1809) 11 East 210 in *Taylor v. Caldwell* (1863) 3 B. & S. 826, 837; but this is surely not the primary question once it is held that the risk was with the buyer.

⁷⁸ *Alexander v. Gardner* (1835) 1 Bing.N.C. 671; *Taylor v. Caldwell*, *supra*; *Martineau v. Kitching* (1872) L.R. 7 Q.B. 436; *Castle v. Playford* (1872) L.R. 7 Ex. 98; *Manbre Saccharine Co. Ltd. v. Corn Products Co. Ltd.* [1919] 1 K.B. 198.

condition precedent to payment⁷⁹: the goods or such part as has been lost need not be tendered, and a tender is good even if the goods are incomplete or damaged. In a c.i.f. contract, the buyer must pay against documents in the usual way.⁸⁰ The buyer by assuming the risk does not, however, undertake an absolute obligation to pay the price: he can plainly reject a tender of damaged goods on other grounds, such as late delivery.

In the discussion so far, it has been assumed that it is always possible for a price to become due for payment although the goods have been lost. But this may not be so: the price may be payable upon an event such as delivery (or so many days after delivery), which ceases to be possible if the goods are destroyed; or the buyer may refuse to accept the documents against which alone the seller's right to the price is to arise. If the contract is construed so that the event merely fixes a time for payment, it seems that the court has power to substitute a reasonable time⁸¹ in these circumstances; but if delivery is held to be a condition precedent to the seller's right to payment, the only possible conclusion is that this is inconsistent with a term, implied or even express, that the risk of loss should be with the buyer, and the latter will have to give way on the ground of repugnancy.⁸²

There still remains a difficulty, created by section 49 of the Act, which prescribes only two situations in which an action for the price will lie: (briefly) (a) where the property has passed, and (b) where the price is "payable on a day certain, irrespective of delivery." If the property has *not* passed, and the price is payable in an event which cannot now happen (*e.g.*, delivery) because of a loss of which the buyer has assumed the risk, it ought to be possible for the court to fix a reasonable time instead: for otherwise the same circumstance would both create the obligation and prevent it from becoming due! There are, indeed, dicta⁸³ which suggest that this absurd conclusion is the law. It would seem preferable to say that the provisions of section 49 are not intended to be exhaustive and that, as in the United States, a seller may sue for the price of goods lost or damaged "within a commercially reasonable time after risk of their loss has passed to the buyer."⁸⁴ But again there are cases which stand in the way of this view of the section.⁸⁵

⁷⁹ *Benjamin on Sale* (8th ed., 1950), p. 830.

⁸⁰ *Manbre Saccharine Co. Ltd. v. Corn Products Co. Ltd.*, *supra*.

⁸¹ *Alexander v. Gardner*, *supra*, at p. 677.

⁸² Contrast the last cited case with *Produce Brokers New Co. v. Wray, Sanderson & Co. Ltd.* (1931) 39 Ll.L.R. 257; and *The Julia* [1949] A.C. 293.

⁸³ *Merchant Shipping Co. v. Armitage* (1873) L.R. 9 Q.B. 99, 111 (freight); *Shell-Mex Ltd. v. Elton Cop Dyeing Co. Ltd.* (1928) 34 Com.Cas. 39, 45-46.

⁸⁴ U.C.C. § 2-709.

⁸⁵ *Stein Forbes & Co. v. County Tailoring Co.* (1916) 86 L.J.K.B. 448; contrast *Workman Clark & Co. Ltd. v. Lloyd Brazileño* [1908] 1 K.B. 968.

Sometimes, another remedy may offer the seller a practical alternative: for instance, an action for damages for non-acceptance,⁸⁶ or refusal to accept documents.⁸⁷ These obligations of the buyer remain unaffected by damage or loss, unless discharged by frustration.

(7) *Effect where seller retains risk*

Where the goods are at the risk of the seller and they are lost, whether before or after delivery, the buyer may resist a claim for the price, or bring a claim for its return if it has already been paid. If the property has passed to the buyer, it may seem illogical that he should be allowed to recover the price as on a total failure of consideration; but the explanation is clearly that the property is held to have passed only defeasibly while the seller continues to bear the risk, so that in the event of loss the property is revested in the seller with retrospective effect.

If the goods are damaged or lost in part while at the seller's risk, the buyer may reject them when tendered, or send back⁸⁸ the goods if such damage occurs after delivery, revesting title in the seller. The latter will then not be able to claim or to retain the price. Alternatively, the buyer may accept or keep the goods in their damaged or depleted state, in which case he must pay for them in accordance with either section 30 (1) or section 53 (1) (a).⁸⁹ If he has paid the whole of the contract price and part of the goods are lost, he may by a singular exception to the general common-law rule, recover a proportion of his price as on a total failure of consideration.⁹⁰

The seller may⁹¹ also be liable in an action for non-delivery or for a breach of an express or implied warranty of quality, unless discharged by frustration; but he cannot sue the buyer for damages for non-acceptance if, as a result of damage or loss, the buyer rejects a tender as not being in accordance with the contract.

Where the seller retains the risk, there must be a point of time when, if only by implication, it eventually passes to the buyer. If this

⁸⁶ *Demby Hamilton & Co. Ltd. v. Barden* [1949] 1 All E.R. 435; [1949] W.N. 72 (see especially the latter report).

⁸⁷ *Stein Forbes & Co. v. County Tailoring Co., supra*; cf. *Colley v. Overseas Exporters Ltd.* [1921] 3 K.B. 302.

⁸⁸ He is not in fact bound to redeliver unless the contract so provides (s. 36). Even in that case, he will be excused if redelivery would be pointless, as where a horse dies: *Chapman v. Withers* (1880) 20 Q.B.D. 824.

⁸⁹ An exceptional case is conceivable where, on analogy with *Sumpter v. Hedges* [1898] 1 Q.B. 673, the buyer might be held not to have made an election to keep the goods.

⁹⁰ *Devaux v. Connolly* (1849) 8 C.B. 640; *Behrend & Co. Ltd. v. Produce Brokers Ltd.* [1920] 3 K.B. 530. Professor Glanville Williams in *The Law Reform (Frustrated Contracts) Act 1943* (1944), 85, does not refer to these cases.

⁹¹ It is possible that the contract may make the seller's right to payment conditional on delivery without obliging him to deliver: cf., *Calcutta Co. v. De Mattos* (1863) 32 L.J.Q.B. 322, 328.

does not occur either on the passing of the property or delivery of possession, the latest moment to which it can continue is that when, by acceptance under section 35, or otherwise, the buyer loses the right to reject. The seller may, however, apparently remain liable after that time for losses attributable to delay through his fault, under the first proviso to section 20.

(8) *Risk in conditional contracts*

It is recognised that the term "condition" may have several meanings in the law of sale, and "conditional contract" and "unconditional contract" almost as many.⁹² We must refer to four now, and a fifth in the next section.

(i) The *existence* of the contract of sale itself may depend upon the happening of some fact or event. In most cases such a conditional contract will have no effect as regards risk: it will remain with the proposed seller.⁹³ But where an offer to sell is coupled with a bailment to the offeree, as for example in a hire-purchase agreement or a delivery on sale or return, a question of risk does arise. There is little doubt that, even if a hire-purchase contract did not expressly place the risk on the hirer, he would be held to have accepted it by implication. A delivery "on approval" or "on sale or return" will in English law⁹⁴ be construed *prima facie* as a bailment with an option to purchase, rather than a sale with a right to reject. On this construction, if loss or damage occurs without fault, the "seller" as owner must bear the risk; but this may be varied by agreement (including, of course, usage⁹⁵). The mere fact that the goods cannot be returned intact does not amount to an "adoption" of the transaction converting the bailment into a sale. If, on the other hand, the transaction is construed as a sale with a right to reject, the position will be as in (iv) below.

(ii) The *whole of the obligations* intended to be created by the contract may be conditional—on, for instance, the approval of a third party.⁹⁶ No question as to risk will ordinarily arise here at least until the condition is satisfied.

(iii) The *passing of the property* may by the terms of the agreement be subject to the fulfilment of a condition precedent—often some act, such as appropriation or weighing, to be performed by the seller—pending which many or all of the buyer's obligations remain inopera-

⁹² Stoljar, "The Contractual Concept of Condition" (1953) 69 L.Q.R. 485; Smith "The Right to Rescind for Breach of Condition" (1951) 14 M.L.R. 173.

⁹³ *Poole v. Smith's Car Sales (Balham) Ltd.* [1962] 2 All E.R. 482, 489. There may, of course, be independent liability on the bailment.

⁹⁴ S. 18, rule 4. Contrast the position in the United States, where the two are distinguished, with differing provision as to risk: U.C.C. § 2-327.

⁹⁵ *Bevington v. Dale* (1902) 7 Com.Cas. 112 (fur trade).

⁹⁶ *Marten v. Whale* [1917] 2 K.B. 480.

tive. There is no doubt that in a contract of this kind the seller as owner must bear the risk of loss unless the buyer expressly⁹⁷ (or perhaps by implication) agrees to accept it before the condition is satisfied. Such an agreement can obviously be made or found to exist if the goods are identified or form part of a specific bulk. Exceptionally, the parties may agree that the buyer shall take the "risk" of the failure of a specific source⁹⁸; but it is submitted that there is an essential distinction between this, the sale of a chance, and a contract for the sale of goods to which "the risk" is incidental. *A fortiori*, it is surely true that the principle *genus nunquam perit* will prevent the parties from agreeing that the buyer shall bear the risk of loss in the case of goods which have not in some sense been identified by the contract. In other words, a contract will not be so construed as to allow the seller to appropriate to the contract goods otherwise undesignated which are already known⁹⁹ to have perished, and to rely on a bare provision placing the risk on the buyer to justify his claim for the price.¹

(iv) The contract may provide or imply that the property shall pass either at once or at a subsequent time to the buyer, but that it shall vest in him defeasibly, that is, subject to a *condition subsequent*. In this case, in the event specified by the condition, the sale is rescinded and the property reverts in the seller. It may be agreed or understood that until the failure of the condition² the risk shall be with the seller. This is the explanation of *Head v. Tattersall*. If, however, the risk is with the buyer pending the fulfilment or failure of the condition, the condition can operate only if the goods have not meantime suffered loss or damage: in other words, rescission will be possible only if *restitutio in integrum* can be made. Where a right to return is conferred by express agreement (as is still customary in the sale of horses³), it is probable that on the authority of *Head v.*

⁹⁷ *Inglis v. Stock* (1885) 10 App.Cas. 263.

⁹⁸ *e.g.*, the buyer in *Howell v. Coupland* (1876) 1 Q.B.D. 258, could have agreed to pay the price "crop or no crop."

⁹⁹ The position where the seller is unaware of the loss has not arisen for consideration. There is plainly not the same room for objection, at least in the case of a sale *c.i.f.* of goods already shipped.

¹ Contrast *Clark v. Cox, McEuen & Co.* [1921] 1 K.B. 139, with *Re Olympia Oil & Cake Co. and Produce Brokers Co.* [1915] 1 K.B. 233. The contracts in these cases were perhaps exceptional in that there was an express right to declare a lost vessel with consequent cancellation of the contract.

² If the condition is waived, or prevented from operating (*e.g.*, by legislative action), the sale becomes absolute: *Maine v. Lyons* (1913) 15 C.L.R. 671.

³ I am indebted to Tattersalls Ltd. for permission to refer to their current conditions of sale. These place the responsibility for the accuracy of all information concerning the pedigree, description, health and condition of a horse on the vendor and not Tattersalls Ltd. as auctioneers, and further provide that "if the purchaser of any horse sold with a Pedigree or Description contends that it does not correspond with such Pedigree or Description, the horse must be returned . . . to the place of sale before 5 o'clock p.m. on the seventh day after

Tattersall the seller will be held to have assumed the risk so long as the buyer's right remains open. But in other cases, there may be a converse rule or presumption, derived from the general legal and equitable limitations on the exercise of a right to rescind. This question is discussed in the following paragraph.

(9) *Risk where performance defective or contract avoided or repudiated*

In the preceding section no reference was made to the use of the term "condition" to mean "essential undertaking"—the "condition" referred to in section 11 (1) (b), breach of which may justify repudiation, and exemplified in the statutory implied terms of sections 12–15. The indiscriminate use in the Act of this term to describe what were both at common law and in Chalmers' draft⁴ distinguished as *warranties* of quality on the one hand and the *essential description* of the contract goods on the other has given rise to endless confusion and misunderstanding.⁵ This is rendered even worse by the unhappy telescoping into the now notorious section 11 (1) (c) of what were drafted as two separate clauses.⁶ The consequence of all this statutory muddle is that there is no longer scope to make a proper differentiation between (a) specific⁷ goods sold as such, (b) specific goods sold with "descriptive" (that is, qualitative) words, (c) generic goods sold *by description* (that is, goods *essentially defined* by such description) and (d) generic goods sold "by description" in this sense, with further descriptive or qualitative words added. No doubt it is not now legitimate to make this differentiation in relation to the questions whether the buyer has a right to reject and whether he has lost it, but the need to do so is constantly met in other contexts.⁸ It is

the last day of the sales and notice in writing of such contention must be received by Tattersalls within such time. Failure to return the horse, and give notice as prescribed in this condition, shall be an absolute bar to any claim in respect of any alleged error in Pedigree or Description, and the Purchaser shall be bound to keep and pay for the horse whether or not it complies with such Pedigree or Description." Although expressed as a limitation rather than as a right, this wording would appear to afford ample scope for the application of the principle of *Head v. Tattersall*.

⁴ See Chalmers, *Sale of Goods* (1st ed., 1890), pp. 17–25. Only what is now s. 13 (implied condition that goods sold by description shall correspond with the description) and s. 15 (2) (b) (that there shall be an opportunity for comparison of sample with bulk) were drafted as conditions: the rest of the statutory implied conditions appeared as warranties. But Chalmers himself had doubts on the subject: see pp. 22, 25 and 95.

⁵ This was first demonstrated by Montrose in a note in (1934) 5 C.L.J. 275. See also Melville, "The Core of a Contract" (1956) 19 M.L.R. 26; Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 L.Q.R. 534; Jenkins, "The Essence of the Contract" [1969] C.L.J. 251.

⁶ See Chalmers, *op. cit.*, clauses 14 (3), p. 16, and 56, p. 83.

⁷ The terms "specific," "generic" and "sold" are here used in a general sense and not as strictly defined for the purposes of the Act.

⁸ For a recent example see *Christopher Hill Ltd. v. Ashington Piggeries Ltd.* [1971] 2 W.L.R. 1051. It is essentially the same question which is discussed in the articles mentioned in n. 5, above.

submitted that it may be relevant also in regard to risk. If there is a contract for the sale of goods, and the buyer rejects the goods after delivery on the ground of breach of condition, the question arises as to the incidence of the risk between the time when it would ordinarily have passed to the buyer and the time when by rescission it is revested, along with the property, in the seller.⁹ For example, the bargain may be for the sale of mahogany logs f.o.b. On arrival, the buyer may seek to reject the consignment because the logs are pine logs, or although mahogany logs, seriously undergrade. Three views may be taken of the situation as regards property and risk in these circumstances.

(i) That the property and risk remain throughout with the seller because it is a condition precedent to the passing of both that the seller has fulfilled all the obligations imposed on him by sections 12 (1), 13, 14 and 15. This view was favoured in some old cases and even in two decisions since the Act¹⁰; but it is inconsistent with some later cases¹¹ and is basically incompatible with any sale of specific goods.¹² It is, however, likely that the purported appropriation by a seller of goods which are *essentially* different from the contract description amounts to the unsolicited offer of a new contract, so that whatever the original contract provides, the substituted goods are throughout at the seller's risk.

(ii) That the property passes defeasibly, subject to reversioning on rejection; but that the risk at all times remains with the seller. This view is in accordance with *Head v. Tattersall*, and has been adopted in the United States.¹³

(iii) That the property passes defeasibly, but that the risk also passes, so that the buyer may exercise his right to reject only if loss or damage has not occurred before rejection. Dicta in some old cases support this proposition¹⁴ as does the accepted view¹⁵ that at common law *restitutio in integrum* has to be made exactly or rescission is not available.

The practical differences between the first two views stem mainly from the fact that the parties will have been under a misapprehension as to which of them should have insured the goods. If the buyer *has* taken out insurance and the proceeds^d are made available to the

⁹ The buyer may, however, be liable as a bailee: see s. 20, second proviso.

¹⁰ *Varley v. Whipp* [1900] 1 K.B. 513; *Ollett v. Jordan* [1918] 2 K.B. 41.

¹¹ See below, n. 17.

¹² Cf. *Taylor v. Combined Buyers Ltd.* [1924] N.Z.L.R. 627.

¹³ See U.C.C., § 2-510.

¹⁴ See, e.g., *Grimoldby v. Wells* (1875) L.R. 10 C.P. 391, 395.

¹⁵ *Clarke v. Dickson* (1858) E.B. & E. 148. But perhaps the common law rule is subject to more qualification than has traditionally been supposed: cf. Treitel, *Law of Contract* (3rd ed., 1970), 320-21.

seller,¹⁶ little injustice will in the end have been done. But the buyer will not ordinarily have been under a *duty* to insure, and if he has not done so a seller who would have himself been at pains to insure will suffer the whole loss.

Under the third view, the differences are not merely practical but affect the contractual consequences as well. The buyer will, in effect, have taken the risk that loss or damage may prevent the exercise of his right to reject.

The modern cases¹⁷ tend to support the interpretation that property passes defeasibly even though a condition has been broken. It is therefore likely that, except in the case of non-compliance with the essential contract description (category (c) above), the courts will now take either view (ii) or view (iii). It is submitted that both in the case where a right of return is expressly conferred (when *Head v. Tattersall* would have to be followed, or distinguished on some other grounds) and when it arises by operation of law, the seller should bear the risk retrospectively. To hold otherwise would unnecessarily penalise the buyer when the seller is in breach. In appropriate cases an implied agreement or custom to the contrary might be found to exist.

Where goods are *wrongly* rejected, the issue of risk is naturally not affected, unless the repudiation is accepted by the seller so as to rescind the contract.

In the case of rescission for innocent or fraudulent misrepresentation, the equitable rules allow rather more flexibility in the making of *restitutio in integrum*. There ought therefore to be less difficulty than at common law in holding that the seller takes the risk that restitution may be less than exact because of an event for which the buyer is not responsible.

One aspect of this contention (that the risk in goods properly rejected should be deemed retrospectively to have remained with the seller) which gives cause for concern is that the parties will have assumed the contrary, and if anyone has insured, it will have been the buyer. It is unlikely that the seller will have insured on a contingency basis; and there is no rule converse to section 47 of the Law of Property Act 1925 which could operate to give the seller the benefit of the buyer's insurance.

¹⁶ But *quaere* whether a buyer has an insurable interest in these circumstances, and whether a seller would have any claim to the insurance moneys if he has.

¹⁷ See e.g., *Kwei Tek Chao v. British Traders & Shippers Ltd.* [1954] 2 Q.B. 459; *McDougall v. Aeromarine of Emsworth Ltd.* [1958] 1 W.L.R. 1126. The amendment of the Sale of Goods Act by s. 4 (2) of the Misrepresentation Act 1967 has arguably strengthened the case for this interpretation.

(10) *Risk and frustration*

If the goods suffer loss or damage¹⁸ without the fault of either party, the event causing the loss may be such as to frustrate the contract, and at the same time be the very event to which the risk relates. In such a case, the express or implied agreement as to the risk must prevail over the ordinary consequences of frustration, so that the price is payable or not payable according as the buyer or the seller has assumed the risk of loss. The same is true in the particular case of specific goods which perish: section 7 by its terms does not apply where the risk has passed to the buyer.

The doctrine of frustration (or, where appropriate, section 7) will, however, operate so as to relieve the party who carries the risk from any additional liability in damages. For example, suppose that a specific quantity of grain is sold on terms that the property passes at once, but it is agreed that the risk shall remain with the seller until delivery, which is promised in a week's time. If the grain is destroyed in a fire before delivery,¹⁹ the seller has no claim to the price, because the risk was with him; but whether or not he has a defence to an action for damages for non-delivery depends on the doctrine of frustration.²⁰ There is no reason to assume, however, that the loss or damage will always amount to a frustrating event (or to “perishing” within the meaning of section 7). If the grain accidentally suffers wetting on the eve of delivery but is still physically capable of being delivered, and merchantable as grain, the seller has no option but to compensate the buyer for the loss involved. If we suppose further that the buyer is entitled under the contract to reject the grain in its damp state, the seller will have no answer to a claim for damages for a non-delivery, unless the court is prepared either to hold the contract frustrated or to construe the contract as one where the seller took the risk of non-delivery but did not promise to deliver.²¹

Where the situation is reversed, and the property remains in the seller but the goods are to be at the buyer's risk until delivery, the buyer must pay the full price when the goods are lost or damaged and must take the goods although in a defective or depleted state, since this is the risk he has assumed. He may also be liable to the seller in damages for non-acceptance, unless excused on the grounds

¹⁸ Where the contract is frustrated without any loss or damage, the frustrating event is probably outside the scope of “the risk”: see above, § 2.

¹⁹ Note, incidentally, that these facts come within the peculiar wording of s. 2 (5) (c) of the Law Reform (Frustrated Contracts) Act 1943.

²⁰ If the property had not passed, it would depend on s. 7.

²¹ *Calcutta Co. v. De Mattos* (1863) 32 L.J.Q.B. 322 (above, p. 233). An alternative view of these facts might be that the wetting was an event outside “the risk”: see above, p. 230.

of frustration. Acceptance will clearly be impossible where there is nothing left to accept: but where some part of the goods remains (whether damaged or not), the buyer is bound to accept them or pay damages; and even in the case of a total loss he may be under a duty to accept documents.²² Where loss occurs after delivery is due but before it has taken place, there may also be liability to pay damages and expenses under section 37.²³

In any case where the goods are at the seller's risk pending delivery and suffer loss or damage, no question arises as to the buyer's liability for non-acceptance, since his obligation to accept is conditional upon due tender of delivery by the seller. In the converse case, when the risk is with the buyer, no action will lie against the seller for damages for non-delivery if the goods are lost or damaged—not, it is submitted, because of frustration, but because this is necessarily implicit in the buyer's assumption of the risk. The question of frustration will be relevant only if non-delivery is due to an event outside the scope of the risk.²⁴

Where loss or damage occurs after delivery, the only issues which arise are: the buyer's liability to pay the price, which depends on whether he was the risk; and the buyer's right to reject or return the goods, which has been discussed in § 9. Here, again, the exercise of the right to return may be defeated by an event outside the scope of the risk. The sale will then become absolute, whichever party has the risk.²⁵

(11) *Risk and liability under other heads*

The second proviso to section 20 preserves the liability of a party as a bailee of the goods of the other. Also, by virtue of other sections²⁶ and generally under the law of tort, a party may be liable to the other for loss or damage resulting from his fault. We must therefore consider briefly the relationship between these heads of liability and "the risk."

Where several acts attributable to the fault of the respective parties to a contract of sale combine to cause the same damage to the goods, there may be scope for the application of the Law Reform (Contributory Negligence) Act 1945, if on principle this Act is held to govern situations where the "fault" of a party is a breach of a contractual obligation or statutory duty. This basic issue remains unsettled.²⁷

²² *Stein Forbes & Co. v. County Tailoring Co.* (1916) 86 L.J.K.B. 448.

²³ Atiyah, *Sale of Goods*, p. 161.

²⁴ § 2, above. A different view is taken by Glanville Williams: *The Law Reform (Frustrated Contracts) Act 1943* (1944), pp. 82, 84.

²⁵ *Maine v. Lyons* (1913) 15 C.L.R. 671.

²⁶ s. 20, first proviso; s. 32 (2).

²⁷ Glanville Williams, *Joint Torts and Contributory Negligence* (1951), s. 59; Treitel, *Law of Contract* (3rd ed., 1970), 829.

Where the goods are in some respects at the risk of the buyer and in others at the risk of the seller, it could again happen that different events combine to cause the same damage. Section 33 gives an illustration of overlapping “risks”—the seller having the general risk and the buyer that of deterioration necessarily incident to the course of transit. It must follow from section 33 that if deterioration is due to a combination of a “transit” risk and some other cause, the loss is to be shared. Perhaps the ordinary principles of causation are adequate to ensure that one party does not bear more than is his due, both here and in other cases of overlapping “risks.”

The question may also arise whether an event (such as theft of the goods) falls within the liability of the party who carries the risk, or of the other party whose “fault” has caused or enabled the event. Plainly this resolves into a matter of the onus of proof. It will ordinarily be the obligation of the party alleging fault to prove it: if he fails to do so, the loss will fall within “the risk.” But a bailee, whether gratuitous or not, must show that the loss was *not* attributable to want of due care on his part, so that if evidence in this regard is lacking, he will be presumed to have been at fault, and held liable.²⁸

“Fault” is defined for the purpose of the Act as “wrongful act or default,”²⁹ and so must be given this meaning in sections (such as the first proviso to section 20) which connect risk with fault. But it may generally be said that no party by accepting the risk accepts the consequences of a breach of contract by the other; and this has been assumed in the discussion above, where “fault” has been understood to include any breach of the contract which may cause loss or damage to the goods.

A rather different question arises in connection with “acceptance” of the goods under section 35, or “adoption” of a “sale or return” transaction for the purposes of section 18, rule 4. Here the act or election of a party may have the consequence that it is no longer in the power of the buyer to reject or return the goods, and therefore of transferring the risk to the buyer if it has not already passed to him. It is unnecessary to speak of “fault” in this connection. No doubt if a buyer goes beyond the limits contemplated or allowed by the contract in (for example) making a fair trial of the goods, he may have cause to blame himself: but he has merely affirmed, and not broken, the contract.³⁰

²⁸ *Wiehe v. Dennis Bros.* (1913) 29 T.L.R. 250.

²⁹ s. 62 (1).

³⁰ *Genn v. Winkel* (1912) 107 L.T. 434; *cf. Head v. Tattersall* (1871) L.R. 7 Ex. 7, 10, 12; *Curtis v. Hannay* (1800) 3 Esp. 82.

THE WANING OF PARENTAL RIGHTS

J. C. HALL

FIFTY years ago the rights of a parent were held in high regard by English law. Since then there has taken place a fairly steady erosion of those rights, so that the picture presented today differs quite markedly from that of the early 1920s.¹

The principal reason for this decline in strength of parental rights is not far to seek: it lies in the ever-increasing concern of society for the well-being of its youngest members. Thus throughout most of the period under review tension has continued between the two principles of respect for the wishes of the parent on the one hand and promotion of the interests of the child on the other; and in general the first has gradually yielded to the second. The increasing ascendancy of the latter is to be seen mainly in the law's changing approach to disputes concerning custody, and in the steadily widening compulsory powers of removal of offspring from their parents at the behest of public officials.

Running roughly parallel with this development, though diverging from it in some respects, has been the creation of the (for us) totally new legal institution of adoption. Further influences have been the recognition that the traditional age of majority was set at an age too high for modern needs and ought to be lowered, and a desire to rid the law of certain anachronistic causes of action which remained available for the protection of parents.

These several aspects of the story will be considered in turn (the first at some length, but the remainder quite briefly). Finally an attempt will be made to take stock of the present situation and to suggest some lines of reform which might with advantage be followed in the future.

Custody disputes

It should first be made clear that the term "custody" will here be used in its wider and more usual sense.² As such it embraces a

¹ See generally P. M. Bromley, *Family Law* (4th ed., 1971), pp. 246-339; T. E. James, *Child Law* (1962); P. H. Pettit, "Parental Control and Guardianship" (*A Century of Family Law* (1957), Chap. 4); *Parental Custody and Matrimonial Maintenance*, Pt. I (B.I.L.C.L., 1966); M. Craffe, *La Puissance Paternelle en Droit Anglais* (1971).

² There is a helpful exposition of the two meanings of the term by Sachs L.J. in *Hewer v. Bryant* [1970] 1 Q.B. 357, 372, 373.

bundle of powers, including the power to control education and to choose religion, as well as the power to exercise physical control until the child reaches the age of discretion.³

What was the position fifty years ago if a dispute as to custody arose between a parent and a non-parent? The answer is by no means clear. Certainly the common law, which ascribed to the father a near-absolute right to the custody of a legitimate child,⁴ had by then been extensively modified, first by a series of nineteenth-century statutes culminating in that of 1886,⁵ which in effect obliged him to share his right with the mother, and second by equity. The puzzle is to know quite how far equity had carried its policy of mitigating parental rights in favour of the child's own well-being by the early 1920s. It is frequently maintained that equity had already established the principle of "paramountcy" ⁶ of the child's welfare by the time that Parliament passed the Guardianship of Infants Act 1925,⁷ and even that equity had *always* applied this principle.⁸ But the evidence does not unequivocally support the first proposition; and it clearly refutes the second. Thus in 1883, by which time of course equitable rules prevailed, Sir Baliol Brett M.R. expressly adopted the principle earlier formulated by Bacon V.-C.,⁹ that the court "has no right to interfere with the sacred right of a father over his own child" in the absence of a charge of immorality of conduct,¹⁰ and Cotton L.J. was clear that "it is not in our power to go into the question as to what we think is for the benefit of this ward."¹¹

Ten years later, it is true, the same Master of the Rolls (by now Lord Esher M.R.) spoke in strikingly different terms in *R. v. Gyngall* ¹²; and two other cases decided in the last decade of the nineteenth century also proclaimed the child's own welfare as the

³ The "bundle" also includes the power to veto the issue of a passport, withhold consent to marriage, and administer the minor's property. Thus in this sense custody is almost equivalent to guardianship. On the other hand the term "custody" is sometimes (e.g., in the Limitation Act 1939, as amended) used in the narrow sense of care and control. For a discussion of the confusion, see *post*, p. 261. For the meaning of "age of discretion," see *post*, p. 265.

⁴ *R. v. De Manneville* (1804) 5 East. 221; *R. v. Greenhill* (1836) 4 Ad. & E. 624.

⁵ Guardianship of Infants Act 1886, s. 5.

⁶ See *post*, p. 255, n. 51, for the origin of this term.

⁷ S. 1 of this Act (now the Guardianship of Minors Act 1971, s. 1) made the welfare of the child "the first and paramount consideration" in any dispute concerning its custody or upbringing. See *post*, p. 251.

⁸ See Bromley, *op. cit.*, pp. 264, 270; James, *op. cit.*, p. 16; Pettit, *op. cit.*, p. 63; *Parental Custody and Matrimonial Maintenance* (B.I.C.L., 1966), p. 18 (Dr. O. M. Stone). For the judicial authority, see *post*, n. 32.

⁹ *Re Plomley* (1882) 47 L.T. 283, 284.

¹⁰ *Re Agar-Ellis* (1883) 24 Ch.D. 317, 329. Lord Upjohn described this case as "dreadful" in *J. v. C.* [1970] A.C. 668, 721D.

¹¹ *Ibid.* p. 334. See also the judgment of Bowen L.J., who expressed agreement with the observation of Kindersley V.-C. that if the benefits of the child were to be considered, he suspected "that the peace of half the families in the country would be disturbed . . .": *Re Curtis* (1859) 28 L.J.Ch. 458, 459.

¹² [1893] 2 Q.B. 232.

predominating consideration.¹³ However, this success was short-lived, because one finds in *R. v. New*,¹⁴ the first reported English decision of this century on the topic, an emphatic reversion to older doctrine. Here a mother sought to recover her daughter from foster-parents with whom she had placed her some ten years previously, in order to be able to send the child to a Church of England Home (where no one would be allowed to visit her for the first two years of her residence). Counsel for the foster-parents, relying of course on the decisions of the 1890s,¹⁵ submitted that the "primary matter to be taken into consideration was the welfare of the child"; but in vain, for a unanimous Divisional Court, affirmed by a unanimous Court of Appeal, decided in favour of the mother. Both the Lord Chief Justice in the first and the Master of the Rolls in the second approached the problem from the standpoint of rights rather than welfare. In such a case, declared Collins M.R., the court would look primarily to the wishes of the mother, and "her view as to what sort of religious education she desired her child to have must prevail."¹⁶

A few years after this decision the pendulum seems to have swung again in favour of the child. In the divorce case of *Mozley Stark v. Mozley Stark and Hitchins*¹⁷ Cozens-Hardy M.R. emphasised that "the benefit and interest of the infant is the paramount consideration and not the punishment of the guilty spouse"¹⁸; and this was followed by two cases exemplifying even more powerfully the modern welfare approach. In *Re Mathieson*¹⁹ a father was seeking the custody of his ten-year-old daughter from his brother. He had originally asked the brother to bring up the child as she was sickly and he could not provide for her needs, and during the seven or more years that she had lived with her uncle her health had greatly improved. But the father and mother now wished her to return to live with them and their six other children in a tenement consisting of two rooms and a kitchen, where they even contrived to take an occasional lodger as well. The Court of Appeal had no hesitation in affirming the decision of Eve J. that the father's application for custody failed.

After a father has actually surrendered the custody of the child to relations who agree to bring it up . . . if the court sees, after

¹³ *Re McGrath* [1893] 1 Ch. 143; *Re A. and B. (Infants)* [1897] 1 Ch. 786. See also *Re Harriet O'Hara* [1900] 2 I.R. 232, 239-241, per Fitzgibbon L.J.

¹⁴ (1904) 20 T.L.R. 583.

¹⁵ *Supra*, nn. 12, 13.

¹⁶ At p. 584. This case was also castigated as "dreadful" by Lord Upjohn in *J. v. C.* [1970] A.C. 668, 723A.

¹⁷ [1910] P. 190, 194.

¹⁸ In this case the father had been awarded custody of the daughter at the time of the divorce proceedings owing to a finding of adultery against the mother, but the Court of Appeal now discharged the order as the girl had reached 16 and was therefore free to live where she pleased.

¹⁹ (1918) 87 L.J.Ch. 445.

the child has been there for some time, that to revoke the arrangement and insist upon the return of the child to the parents would be injurious to the best interests of the child, then the court is not under any obligation to make an order for the return of the child.²⁰

In the same vein was the decision of the House of Lords in *Ward v. Laverty*²¹ a few years later, on the eve of the passing of the Act of 1925. This was an appeal from Northern Ireland concerning three orphans whose paternal great-aunt (a Roman Catholic) sought custody from their maternal grandparents (who were Protestants) in order that they might be brought up in their deceased father's faith. But despite the common law rule that an orphan should be brought up in the father's faith, the claim failed, Viscount Cave L.C. declaring the rule to be "subject to this condition, that the wishes of the father only prevail if they are not displaced by considerations relating to the welfare of the children themselves. It is the welfare of the child which . . . forms the paramount consideration in these cases."²²

These last three cases indicate that by 1925 the tide was flowing strongly in favour of the welfare of the child as the predominating consideration. Nevertheless, it is far from clear that this had by then become a general principle applicable to all custody disputes: for the first case had been concerned with a purely inter-parental dispute, the second with a parent who had virtually abandoned his child, and the third with a situation where both the parents were dead.²³ Not surprisingly, therefore, one finds even the fourth edition of *Simpson on Infants*, published in 1926, still emphasising the importance of parental rights to custody.²⁴

It might be thought that light would be thrown on the existing state of the law by the reports of the parliamentary debates on the Guardianship of Infants Bill 1925, as clause 1 declared that the infant's welfare was to be regarded as the first and paramount consideration in all proceedings involving custody.²⁵ But the evidence is equivocal. In moving the second reading of the Bill²⁶ in the House

²⁰ At p. 447. It was plain here that the removal of the child would be detrimental to its best interests and the father's claim accordingly failed. As the conflict here was between the parents of a legitimate child and a third person the decision is a strong one.

²¹ [1925] A.C. 101.

²² At p. 108. The other members of the House agreed.

²³ However, Lord Upjohn considered that the statement of principle by Viscount Cave L.C. in *Ward v. Laverty*, cited above, was not intended to be confined to orphans: *J. v. C.* [1970] A.C. 668, 723F. But cf. *Re Carroll*, *post*, p. 253.

²⁴ Thus Chap. VII, entitled "Control and Custody," opens with these words: "The Court of Chancery has in numerous cases emphatically recognised the father's right as guardian by nature and nurture to the custody of his child" (p. 91).

²⁵ s. 1 is referred to in more detail *post*, p. 252.

²⁶ The Bill was intended primarily, it appears, to advance women's rights. Apparently some women's organisations considered it should have gone further.

of Commons the Under-Secretary of State for the Home Department referred to this principle as "a most important point" and did not suggest that no innovation was involved.²⁷ Another Member²⁸ deplored the existing state of the law on the ground that "the father's rule [over his child's religion] at the present time is absolutely paramount."²⁹ On the other hand, Mr. Davies, M.P., said he understood that the courts were "in part already carrying out the objects of the Bill,"³⁰ and Viscount Cave L.C., in moving the second reading in the House of Lords, stated that he thought the first clause "accords with the law as now administered by the courts."³¹

One hesitates to suggest that the Lord Chancellor was under a misapprehension as to the state of the law; yet, as Lord Donovan remarked in 1969, it seems "incredible" that Parliament should have passed such an enactment as section 1 of the Act of 1925 if it simply "made no difference at all to the law as already expounded by the judges."³²

On balance, it would seem that there was some lingering uncertainty when the Bill was drafted as to the extent to which the welfare principle had encroached on basic parental rights. But the uncertainty, one might reasonably have assumed, would have totally disappeared with its enactment, for the language of the opening section—"Where in any proceeding before any court . . . the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . ."³³—seemed to place the matter beyond all doubt. Yet, astonishingly, this did not prove to be so. Another forty-four years were to pass before it was settled that welfare considerations really must predominate in all custody proceedings.³⁴

Confusion was created shortly after the passing of the Act by an

²⁷ *Hansard* (House of Commons), Vol. 181 (1924-25), p. 532.

²⁸ Mr. Gerald Hurst, who had served on the Joint Committee of Lords and Commons which had considered the whole problem in 1923.

²⁹ At p. 538. But this seems to overlook *Ward v. Lavery*, *supra*. It is also strange that Mr. Hurst did not consider that the Bill would solve the problem caused by a change of religion on the part of the father after the marriage.

³⁰ At p. 547.

³¹ *Ibid.* (House of Lords) Vol. 61 (1925), p. 522. It was of course Viscount Cave L.C. who delivered the leading opinion in *Ward v. Lavery*, *supra*.

³² *J. v. C.* [1970] A.C. 668, 727D. On the other hand Lord Upjohn maintained that the Act "enshrined the view of the Chancery Courts," and Lord Guest apparently agreed with him: pp. 724E, 697F, respectively. See also *Re Thain* [1926] Ch. 676, 689, 691; *McKee v. McKee* [1951] A.C. 352, 366; and *Re Adoption Application No. 41/61* [1963] Ch. 315, 328 for expressions of this (the more orthodox) view.

³³ The remainder of s. 1 (now s. 1 of the Guardianship of Minors Act 1971) enjoins the court not to take into consideration whether from any other point of view the claim of the father or any common law right of the father in respect of custody, etc., is superior to that of the mother, or vice versa.

³⁴ *J. v. C.* [1970] A.C. 668.

unfortunate misunderstanding of the decision in *Re Thain*.³⁵ The court's conclusion in that case that the daughter should be returned to her father by her aunt was no doubt unexceptionable in the light of the finding that she would be equally well cared for in either home,³⁶ but the observations by Eve J. concerning "the wishes of an unimpeachable parent" were later to be removed from their context and given undue significance.³⁷ Steps were eventually taken by Danckwerts L.J. in 1962 to clarify the position and remove the misapprehension as to the order of priorities between the wishes of an unimpeachable parent and the well-being of the child.³⁸

Meanwhile in 1930 a strikingly successful rearguard action was fought in favour of parental rights. This was the case of *Re Carroll*,³⁹ which involved a dispute between the mother of an illegitimate child and a Protestant Adoption Society to whom she had previously handed the child and who had passed the child on to a couple who hoped to adopt her. The mother now wished to recover her daughter in order to place her in an institution where she would be brought up in the Roman Catholic faith. Both Charles J. at first instance and a Divisional Court on appeal considered that the child's welfare would best be served by leaving her where she was, and they rejected the mother's claim; but the Court of Appeal, by a majority, reversed the lower courts.⁴⁰ Scrutton L.J. approached the problem from the standpoint of parental rights; and he stated that he could see no change in the relevant law during the preceding forty years, except that the mother's wishes had now been put on an equal footing with the father's. Thus he concluded that "the mother has a legal right to require that the child shall be brought up in her religion" and that the court "should not sanction any proposal, excellent in itself, which does not give effect to the parents' views on education, religious and secular."⁴¹ He was supported by Slesser L.J. in a lengthy and erudite judgment which cited, *inter alia*, a Year Book of Edward IV, the *Codex Juris Canonici* and other early canon law,⁴² but which dismissed the Guardianship of Infants Act 1925, s. 1, as irrelevant to the present problem, being "in my view . . . confined . . . to questions as between the rights of father and mother."⁴³

³⁵ [1926] Ch. 676.

³⁶ But Eve J.'s approach to the effect on the child of being transferred from one home to another was based on what would now be regarded as obsolete child psychology.

³⁷ The headnote in the *Law Reports* is misleading: *J. v. C.* [1970] A.C. 668, 711D, *per* Lord MacDermott.

³⁸ *Re Adoption Application No. 41/61* [1963] Ch. 315.

³⁹ [1931] 1 K.B. 317.

⁴⁰ Greer L.J. dissented.

⁴¹ At pp. 335, 336.

⁴² At p. 354.

⁴³ At p. 355. The Act was accorded only a brief, passing mention by Scrutton L.J. at p. 337.

It was not until 1969 that this fallacy was finally laid to rest by the House of Lords; and, in their decision in *J. v. C.*,⁴⁴ they overruled *Re Carroll*. This may be regarded as the final step in the evolution of the welfare principle for resolving custody disputes. The facts of *J. v. C.* were not dissimilar to *Re Mathieson*,⁴⁵ which was discussed earlier, but strangely enough this case was not among the forty-eight authorities cited in the opinions and arguments. *J. v. C.* concerned a Spanish boy who had been born in England and whose parents had almost immediately handed him to foster-parents because of his mother's ill-health. However, he later joined his parents in Madrid, but when he was three his parents returned him to the foster-parents because his health had rapidly deteriorated in Spain. Two years later the parents asked for their son back and he was made a ward of court; but the case dragged on in a most regrettable way and was not finally heard by the House of Lords until the boy was ten.⁴⁶ Ungood-Thomas J. at first instance decided that it would be disastrous for the boy to be sent back to Spain and ordered that he remain with the foster-parents; and both the Court of Appeal and the House of Lords unanimously affirmed this decision. The House had no doubt that section 1 of the Guardianship of Infants Act 1925⁴⁷ is not limited (as had been assumed by the Court of Appeal in *Re Carroll*) to disputes between the parents of a child.⁴⁸ This was a statutory provision, said Lord Donovan, "which is almost refreshing in its clarity," and "the section means just what it says."⁴⁹ Thus welfare considerations must prevail even in disputes between parents and strangers. This did not mean, however, that the parents' wishes were to be ignored, for, in the words of Lord MacDermott, "while there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes . . . can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases."⁵⁰

How then does the erstwhile parental right to custody stand today? The right itself has not been abrogated, but its effectiveness has been drastically curtailed, for in any attempt to enforce it by judicial proceedings it must now yield to what statute calls "the first and

⁴⁴ [1970] A.C. 668.

⁴⁵ See *ante*, p. 250.

⁴⁶ Not surprisingly he had by then become fully integrated into the family of the foster-parents (a solicitor and his wife) and, *mirabile dictu*, had become keen on cricket: see Ungood-Thomas J. at first instance [1969] 1 All E.R. 789, 796.

⁴⁷ Now s. 1 of the Guardianship of Minors Act 1971.

⁴⁸ The narrow view of the Act's operation was derived from its preamble; but this cannot restrain its effect: *Att.-Gen. v. H.R.H. Prince Ernest Augustus of Hanover* [1957] A.C. 436, 463.

⁴⁹ At pp. 726H, 727E.

⁵⁰ At p. 715B. Lord Pearson agreed with Lord MacDermott's opinion.

paramount⁵¹ consideration" of the child's own welfare. This does not mean, as Lord MacDermott explained, merely that the child's welfare is to be "treated as the top item in a list of items relevant to the matter in question." Rather, it connotes "a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare."⁵²

So much is clear. But two further questions arise. The first is whether a child can be removed from its parents and placed with a third person who has never before had custody, if this would be better for the child. The answer is that this is indeed possible in a number of situations, namely, if there are or have been matrimonial proceedings between the parents,⁵³ if either parent has occasion to apply for custody under the Guardianship of Minors Act 1971,⁵⁴ or if the child is made a ward of court.⁵⁵ Otherwise it would seem unlikely, if the child is currently living with its parents, that proceedings could in practice arise in which the above principle would be invoked. On the other hand, as will be shown later, there are wide powers for local authorities to intervene, and once a care order has been made, to remove a child from its parents.⁵⁶

The other question is whether the child himself is entitled to take leave of his parents (assuming that a court has not awarded custody to someone else). A young child clearly may not; but the right of custody, as Lord Denning M.R. has pointed out, is "a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice."⁵⁷ Certainly it has long been settled that *habeas corpus* proceedings will not be available to a parent to compel the child to return once the latter has reached the "age of discretion,"⁵⁸ but there remains the possibility of making the child a ward of court (until the age of eighteen) and he will then

⁵¹ The first use of this "rather curious word 'paramount'" was traced back by Lord Upjohn to *Re A. & B. (Infants)* [1897] 1 Ch. 786; see p. 722C.

⁵² At pp. 710H-711A. See also *Re F.* [1969] 2 Ch. 238, 241C, where Megarry J. explained that what was meant was that the child's welfare was to be "the pre-eminent or superior consideration."

⁵³ Matrimonial Proceedings and Property Act 1970, ss. 18, 19; Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2 (1) (d).

⁵⁴ s. 9.

⁵⁵ Following the scandal caused by *Re Dunhill* (1967) 111 S.J. 113, when a night club owner made a well-known society girl a ward of court for publicity purposes, a person applying for an originating summons must now state his relationship to the ward: *Practice Direction* [1967] 1 W.L.R. 623.

⁵⁶ *Post*, p. 257.

⁵⁷ *Hewer v. Bryant* [1970] 1 Q.B. 357, 369G.

⁵⁸ 16 for a girl and probably 14 for a boy. See *post*, p. 265.

be bound by any order as to residence which the court sees fit to make.⁵⁹

Lastly a rather different and fairly recent development in this field must be mentioned; and it forms an interesting tailpiece to the earlier story of the decline in strength of parental rights of custody. This is the growing concern which the law has shown for the father of the illegitimate child. In 1959 he was accorded a direct procedural right to apply to the court for custody or access⁶⁰; and although the Court of Appeal have made it clear that this change does not put him in the same position as a legitimate father, and merely gives him a *locus standi* to make application,⁶¹ it seems that in practice the courts will be more favourably disposed towards his claims than formerly.⁶² If he is given custody by the court he will have the right to appoint a testamentary guardian, and the right to become a guardian on the mother's death, jointly with any testamentary guardian appointed by her.⁶³ What is more, the argument is now increasingly being heard that if a father is prepared formally to recognise his illegitimate child he should then be placed in the position of a legitimate father for all purposes.⁶⁴ Further advances are to be expected soon in this area of parental rights.

Thus the law relating to custody is still evolving. As Lord Upjohn observed in *J. v. C.*, the rules here "have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children."⁶⁵

Local authorities

The principle was already well-established by the beginning of our fifty-year period that the public could intervene in cases of serious parental inadequacy. The *laissez faire* policy of the common

⁵⁹ See (1967) 83 L.Q.R. 201 (Sir Geoffrey Cross).

⁶⁰ Legitimacy Act 1959, s. 3; now Guardianship of Minors Act 1971, s. 14. Before 1959 the natural father had to institute wardship proceedings.

⁶¹ *Re Adoption Application No. 41/61* [1963] Ch. 315; *Re O.* [1965] Ch. 23.

⁶² As witness the controversial case of *Re C. (M.A.)* [1966] 1 W.L.R. 646, where Russell L.J. stated that he attached great weight to "the blood tie" (pp. 678H-679A) and accordingly the Court of Appeal by a majority (Willmer L.J. strongly dissenting) upheld a decision giving custody to the 47-year-old father of an illegitimate child.

⁶³ Guardianship of Minors Act 1971, ss. 3, 4, 14. It should also be remembered that, irrespective of a custody order, the father (and the mother) of an illegitimate child have rights of succession on his death intestate: Family Law Reform Act 1969, s. 14.

⁶⁴ See for example *Fatherless by Law?* (Church Information Office, 1966); (1968) 17 I.C.L.Q. 634 (Prof. D. Lasok); and the address by Sir Leslie Scarman, Chairman of the Law Commission, to the National Council for the Unmarried Mother and her Child, *The Times*, 21 November 1968.

⁶⁵ [1970] A.C. 668, 722H-723A.

law had not survived the rising social concern which was a feature of the late Victorian era, and in quick succession Parliament had passed a series of Prevention of Cruelty to Children Acts—in 1889, 1894 and 1904. At the beginning of our period the governing Act was the Children Act of 1908, which made it an offence to ill-treat or neglect a child or young person in a manner likely to cause unnecessary suffering or injury to his health⁶⁶; and which provided that an offender could be deprived of custody, the child being committed to the care of a relation or other “fit person.”⁶⁷

The principle enshrined in the Act of 1908 was developed by its successors, the Children and Young Persons Acts of 1932, 1933, 1938, 1956, 1963 and 1969 and the Children Acts of 1948 and 1958. The earlier “fit person order” has become a “care order,”⁶⁸ whereby the child is committed to the charge of a local authority⁶⁹; and the range of parental shortcomings in which the court can make such an order has now greatly expanded. Not only can an order be made if the child or young person is being ill-treated; it can also be made, for example, if his “proper development” is being avoidably prevented or neglected, or his health is being avoidably impaired or neglected; or if he is exposed to moral danger or is beyond his parent’s control (provided that in each case it is also shown that he is in need of care and control which he is unlikely to receive unless an order is made).⁷⁰ This elaborate provision⁷¹ clearly reflects the fruits of many years’ experience of problem families by welfare agencies, and one must hope that its net is now sufficiently wide to catch all or most of the cases where intervention is desirable and justifiable.⁷²

Under the Children and Young Persons Acts a parent can only be deprived of custody of his child by means of judicial proceedings. In this respect a new departure occurred when the Children Act 1948 enabled custody to be forfeited by administrative action, namely, the passing of a resolution by a local authority vesting all parental rights

⁶⁶ s. 12. A number of other offences were also created: exposing the child to burning, and causing or encouraging the seduction or prostitution of a female child under 16 (ss. 15, 17).

⁶⁷ s. 21. A relic of our imperial past is to be seen in s. 21 (6), which authorised the Secretary of State to empower the person given care “to procure the emigration of the child.”

⁶⁸ Children and Young Persons Act 1969, s. 1 (3) (c).

⁶⁹ *Ibid.* s. 20 (1).

⁷⁰ *Ibid.* s. 1 (2). Less drastic orders than a care order are available to the court, such as a supervision order or a hospital order, etc.: s. 1 (3).

⁷¹ The subsection includes other grounds, e.g., that he is guilty of an offence, or that he is of compulsory school age but is not receiving efficient full-time education suitable to his age, ability and aptitude.

⁷² One interesting and important development which took place in 1963 was that local authorities were authorised to diminish the need to receive children into care by providing assistance in kind or even in cash: Act of 1963, s. 1. See “Children without a Satisfactory Home” (1970) 33 M.L.R. 649, 652 (Dr. O. M. Stone).

in itself.⁷³ There are, however, substantial safeguards: such a resolution can only be passed if the child had previously been "received" into the care of the local authority (as distinct from being removed against the parents' wishes)⁷⁴ and if, in the case where a parent is alive or there is a guardian, certain further requirements are satisfied.⁷⁵ Even then the parent may object to the resolution, in which case it will lapse unless it is affirmed by the court on the ground that the objector had abandoned the child or is unfit to have care of it, by reason of mental disorder or of his habits or mode of life.⁷⁶

It is under the preceding statutory provisions that parents are most frequently deprived of their children in favour of local authorities. This can also happen, however, in matrimonial disputes and also when a child has been made a ward of court, for in each such case the court is empowered to commit a child to the care of a local authority if "there are exceptional circumstances making it impracticable or undesirable" for the child to be entrusted to a parent or other individual.⁷⁷

Adoption

Without much doubt the most dramatic curtailment of parental rights to be seen during the last fifty years was the abrogation of the important common law principle that these rights could never be relinquished.⁷⁸ This extraordinary reluctance of English law to countenance any form of adoption (in marked contrast to Roman law of course) survived until as late as 1926⁷⁹; and a full-scale transfer of virtually the whole legal relationship of parent and child did not become possible until 1949.⁸⁰

In so far as the consent of both parents (though merely of the mother if the child was born out of wedlock)⁸¹ is a precondition to the making of an adoption order,⁸² the interference with parental

⁷³ s. 2.

⁷⁴ Receiving into care is governed by s. 1.

⁷⁵ Namely, that a parent or guardian has abandoned him or suffers from some permanent disability rendering him incapable of caring for the child, or is of such habits or mode of life as to be unfit to have the care of the child: s. 2 (1) (b).

⁷⁶ s. 2 (2) (3). See "The Control of Local Authority Powers over Children" (J. Levin), (1971) 1 Fam.Law 101.

⁷⁷ Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2 (1) (e); Matrimonial Causes Act 1965, s. 36; Family Law Reform Act 1969, s. 7. It appears, as would be expected, that sparing use has been made of these powers.

⁷⁸ See *R. v. Edward Smith* (1853) 22 L.J.Q.B. 116; *R. v. Barnardo* (1889) 23 Q.B.D. 305; *Re Harriet O'Hara* [1900] 2 I.R. 232, 241.

⁷⁹ Adoption of Children Act 1926.

⁸⁰ Adoption of Children Act 1949. See now the Adoption Act 1958, ss. 13-19.

⁸¹ *Re M.* [1955] 2 Q.B. 479.

⁸² Adoption Act 1958, s. 4.

rights through the introduction of legal adoption might seem largely theoretical. But in practice the requirement of parental consent has now, as the result of a steady process of attrition, come to appear somewhat illusory. Even the original Act of 1926 empowered the court to dispense with any necessary consent in certain limited circumstances, for example if the parent could not be found, or had abandoned or persistently neglected the child.⁸³ But these grounds for dispensing with consent were found to be too restricted and they were extended by subsequent legislation. In 1958 "persistent failure without reasonable cause to discharge the obligations of a parent" became a further ground, in order to cover situations when the degree of parental shortcoming fell short of a criminal offence.⁸⁴ Even more significantly the Act of 1949 had introduced the power to dispense with consent if this was "unreasonably withheld."⁸⁵ Here was great scope for judicial development; and so it proved. The ground was at first construed narrowly,⁸⁶ but in due course, after considerable judicial controversy,⁸⁷ the House of Lords in 1971 opted for a broad interpretation, holding in *Re W.*⁸⁸ that the refusal of consent could be unreasonable even though there was no culpability on the part of the parent. "Although welfare *per se* is not the test," declared Lord Hailsham L.C., "the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is reasonable in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."⁸⁹

Now that this objective criterion of what amounts to an unreasonable withholding of consent has been established, the law may be said almost, but not quite, to have reached the position where a parent is denied the right to veto an adoption if it is for the good of the child to be adopted (though it remains true of course that it is most unlikely that the preliminary trial period of care, which must precede the making of an adoption order,⁹⁰ will have taken place at all unless the parent agreed to part with the child for the requisite three-month

⁸³ s. 2 (3).

⁸⁴ Children Act 1958, s. 18, now the Adoption Act 1958, s. 5 (2); *Re P.* [1962] 1 W.L.R. 1296.

⁸⁵ Adoption of Children Act 1949, s. 3 (1) (c), now the Adoption Act 1958, s. 5 (1) (b).

⁸⁶ *Hitchcock v. W.B.* [1952] 2 Q.B. 561; *Re K.* [1953] 1 Q.B. 117.

⁸⁷ Compare *Re W.* [1970] 2 Q.B. 589 and *Re B. (C. H. O.)* [1971] 1 Q.B. 437 where different divisions of the Court of Appeal took quite different views.

⁸⁸ [1971] A.C. 682.

⁸⁹ At p. 699C. This decision was followed in *O'Connor v. A. & B.* [1971] 1 W.L.R. 1223, where the House of Lords upheld a decision to dispense with the consents of both parents, although they were now married and able to provide an adequate home for the child.

⁹⁰ Adoption Act 1958, s. 3.

period). Moreover, a further step may follow soon: in 1970 the Departmental Committee on the Adoption of Children⁹¹ declared themselves provisionally in favour of legislation to make "the long-term welfare of the child . . . the first and paramount consideration in resolving conflicts over adoption."⁹² The implementation of such a proposal would quite clearly drive yet another nail into the coffin of parental rights.

Age of majority

Although originally it was only tenants in knight service who reached adulthood as late as the age of twenty-one, this had since become the age of majority for all classes of society.⁹³ The Family Law Reform Act 1969, implementing the recommendation of the Latey Committee,⁹⁴ reduced the age to eighteen.⁹⁵ Accordingly parental rights cease three years earlier than formerly⁹⁶; and this means, for example, that after eighteen no order for custody can be made,⁹⁷ the ward of court jurisdiction is ousted, and parental consent is no longer needed for marriage.⁹⁸ The last is in practice probably the most important (and perhaps the least desirable) of these three consequences of the Act.⁹⁹

Services

At common law the father, or the mother if he is dead, has a right to the service of an unmarried child under the age of majority (unless the child is engaged in employment which precludes this).¹ To enforce this right the action *per quod servitium amisit* lay against anyone who wrongfully deprived the parent of the child's services, whether by deliberate or negligent injury, or by seduction, abduction, enticement or harbouring.²

As recently as 1968 the Council of The Law Society expressed the opinion that to remove the right of action for seduction of a daughter

⁹¹ Chairman, Sir William Houghton.

⁹² Working Paper on the Adoption of Children, 1970, § 11.

⁹³ See "The Age of Majority" (Prof. T. E. James) (1960) 4 *American Journal of Legal History* 22.

⁹⁴ Report of the Committee on the Age of Majority, 1967, Cmnd. 3342.

⁹⁵ s. 1.

⁹⁶ But not all the parental obligations: Family Law Reform Act 1969, s. 5; Guardianship of Minors Act 1971, s. 12; Matrimonial Proceedings and Property Act 1970, s. 8.

⁹⁷ It was rare for a court to make such an order in the case of a child of 18 or over.

⁹⁸ Family Law Reform Act 1969, s. 2.

⁹⁹ See the powerful dissenting opinion of two members of the Latey Committee at §§ 561-580. See also (1968) 31 M.L.R. 429, 432-434 (B. Downey).

¹ *Dean v. Peel* (1804) 5 East. 45; *Terry v. Hutchinson* (1868) L.R. 3 Q.B. 599.

² See Clerk & Lindsell, *Torts*, 13th ed. (1969), §§ 829-840. Professor Sir Percy Winfield traced the extension of this action from masters to parents back as far as 1653: *Tort*, 3rd ed. (1946), p. 229.

would "cut at the very foot of family stability,"³ but the Law Commission took the view that the action for seduction, enticement or harbouring of one's child should be abolished.⁴ This was subsequently effected by the Law Reform (Miscellaneous Provisions) Act 1970, s. 5, which provides that no person shall be liable in tort "(b) to a parent . . . on the ground only of his having deprived the parent . . . of the services of his or her child by raping, seducing or enticing that child; or (c) . . . for harbouring the . . . child. . . ."

The right to service as such remains. Thus the parent can still, in appropriate circumstances, maintain an action against the motorist who knocks down his child, or against anyone who abducts the child. In this field, therefore, parental rights have not entirely disappeared.

Conclusion

Whatever other qualities it may possess, the present law concerning parental rights could scarcely be described as remarkable for its elegance. No doubt a somewhat patchwork appearance is inevitable when basic common law principles have first been modified by equity and later drastically, but selectively, reformed by statute; but not only is the resultant law untidy, it is also beset with a number of uncertainties. Hence what is now needed is both a reformulation and a clarification.⁵

In some areas, admittedly, such as adoption and the powers of local authorities, the law is set out with reasonable clarity in the relevant Acts of Parliament⁶; but in the broader field of guardianship elucidation is badly needed.⁷ The complexity of the law here is quite formidable. There are, as it were, three tiers of rights: in descending order, guardianship, custody, and care and control⁸; and of these the first normally, but not necessarily, includes the second,⁹ and the second normally, but again not necessarily, includes the third.¹⁰ The terminology itself gives rise to further confusion: the word "guardianship," though in practice generally confined nowadays to the relationship

³ Quoted in the Law Commission's Working Paper No. 19, 1968, p. 56.

⁴ *Ibid.*, §§ 88, 90; Law Com. No. 25, 1969, §§ 101, 102.

⁵ As Dr. O. M. Stone has pointed out, the tendency of English law in this field has been "to think not in terms of general rights, but of particular remedies available in particular courts, and sometimes under particular statutes": *Parental Custody and Matrimonial Maintenance* (B.I.I.C.L., 1966), 10, 31.

⁶ Though consolidation is needed of the Adoption Acts 1958-68, and even more so of the Children and Young Persons Acts 1933-69.

⁷ It is also needed for parental obligations, though this falls outside the scope of the present article.

⁸ A right of access might be described as a fourth tier.

⁹ A custody order is of course frequently made in favour of a person who is not the guardian. *Cf. Re T. (orse, H.)* [1963] Ch. 238.

¹⁰ A so-called split order, whereby formal custody is given to one person but care and control to another, is often made by the divorce court and can also be made by magistrates under the Guardianship of Minors Act 1971, though not under the Matrimonial Proceedings (Magistrates' Courts) Act 1960: *Re W.* [1964] Ch. 202; *Wild v. Wild* [1969] P. 33.

between a person standing in the shoes of a parent and his ward, is also properly used of the parental relationship itself¹¹; and the term "custody" is used in two different senses, in the wider being almost equivalent to guardianship,¹² and in the narrower being no more than mere care and control.¹³

The subject of natural guardianship (namely the guardianship of a parent) has not so far received its due share of legislative attention. The father is still, by virtue of the common law, the natural guardian of his legitimate child¹⁴; and the mother does not share the guardianship as such while he is alive, despite the fact that the result of statutory intervention is to give her, in effect, a joint right to custody (in the wide sense).¹⁵ Only when the father dies does the mother become guardian (jointly with any testamentary guardian appointed by him).¹⁶ Even if a custody order is made by a court in favour of the mother, the father remains guardian; and although he is thereby shorn of most of his powers, his guardianship is not reduced to the purely nominal, for his consent will still be required before the child's surname can be changed.¹⁷

As far as the illegitimate child is concerned, the position regarding natural guardianship is not absolutely clear. The harsh common law doctrine that such a child was *filius nullius* was abandoned in the late nineteenth century and the courts established that parental rights of custody (in the wide sense) are vested in the mother.¹⁸ No case,

¹¹ Yet further confusion can be caused by the fact that guardianship may be limited to the person or to the assets of the child (or it may extend to both): see n. 14, *infra*.

¹² But not quite: *Re T. (orse. H.)* [1963] Ch. 238, *post*, n. 17.

¹³ It is used in this narrow sense in the Limitation Act 1939, as amended: *Hewer v. Bryant*, *supra*; *Todd v. Davison* [1971] 2 W.L.R. 898.

¹⁴ *Ex p. Hopkins* (1732) 3 P.Wms. 152, *per* Lord King L.C.; *Re Agar-Ellis* (1883) 24 Ch.D. 317, 335; *Re T. (orse. H.)*, *supra*; *Hewer v. Bryant*, *supra*, at p. 372. The older law is complicated by the distinction between guardianship of the person and guardianship of the estate. Originally guardianship by nature only arose where land was left to an infant: 1 Black.Comm. (1765) 461. See also Eversley, *Domestic Relations*, 6th ed. (1951), pp. 331-332. However, in 1880 Jessel M.R. said, "I suppose 'guardian' of an infant means guardian of the person": *Rimington v. Hartley* (1880) 14 Ch.D. 630, 632. See generally Dr. O. M. Stone in *Parental Custody and Matrimonial Maintenance*, (B.I.I.C.L., 1966) 10, at p. 29.

¹⁵ This is the result in practice of s. 1 of the Guardianship of Minors Act 1971. The joint right is of course subject to any contrary court order.

¹⁶ *Ibid.*, s. 3. The provision in subs. (2) for the father to be sole guardian of the child if the mother dies first and does not appoint a testamentary guardian seems otiose.

¹⁷ *Re T. (orse. H.)* [1963] Ch. 238. Moreover his rights of succession on the child's death intestate remain.

¹⁸ As late as 1841 Maule J. could still ask, "How does the mother of an illegitimate child differ from a stranger?" *Re Ann Lloyd* (1841) 3 Man. & G. 547; and Lord Herschel did not consider Maule J. was speaking ironically: *Barnardo v. McHugh* [1891] A.C. 388, 398. The House of Lords there established that "the desire of the mother of an illegitimate child as to its custody is primarily to be considered" (p. 399). However, the House appear to have thought that

however, appears to have decided expressly that she is the natural guardian of her child; though on the other hand, the Guardianship of Minors Act 1971 may be said to assume that she is.¹⁹

The question immediately arises, when the problem of tackling the general confusion is considered, of the value today of the concept of natural guardianship. In practice it is custody (in the wide sense) which looms much larger in importance; and indeed to the public in general a "guardian" is usually contrasted with a parent.²⁰ There is something to be said therefore for the suggestion that in the interests of simplification the concept of custody should be widened slightly so that it would completely supplant natural guardianship, with the consequence that the latter concept could be discarded and the term "guardian" reserved for the person on whom the rights of a parent are artificially conferred, namely the testamentary guardian,²¹ the guardian appointed by the court,²² or the court itself (where the minor has been made a ward of court).²³ On the other hand the principle that the parent is himself a guardian is surely of considerable intrinsic value, and on the whole is worth preserving; but with the important qualification that there can no longer be any justification for confining this natural guardianship of a legitimate child to the father during his lifetime. It follows that there is a need for legislation to convert the father's natural guardianship into a joint guardianship of the two parents.²⁴ In the case of an illegitimate child joint guardianship could perhaps be made to depend on a formal act of recognition of the child by the father (though made only with the mother's consent), failing which the mother should be the sole guardian.²⁵

the mother's rights were still less strong than those of the father of a legitimate child: see p. 396. See also *R. v. New and Re Carroll*, discussed *ante*, pp. 250, 253.

¹⁹ S. 14 (3) expressly provides that if the father of an illegitimate child is awarded custody by the court he shall be treated as if he were the lawful father of the child for the purposes of ss. 3, 4, 5, and 10 of the Act. The absence of any express mention of the mother of an illegitimate child suggests that at least she has the rights of the mother of a legitimate child and probably those of the father as well. (This Act was only a consolidating Act.)

²⁰ The signature is often requested of "the parent or guardian." But *cf.*, the Preliminary Form of Application for Admission to the Colleges of the University of Cambridge, which (correctly) asks "for the 'name . . . of guardian, if not father.'"

²¹ Guardianship of Minors Act 1970, s. 4.

²² *Ibid.*, s. 5.

²³ There was formerly another kind of guardian, namely a guardian appointed by the infant himself: see *Re Brown* (1881) 18 Ch.D. 61, 65, 67, 72. This is now almost certainly obsolete, but the point could usefully be confirmed by statute.

²⁴ The Prime Minister promised such legislation in a speech on 19 May 1971: see *The Times*, 20 May 1971.

²⁵ It would still be open to the father to apply for custody or access under the Guardianship of Minors Act 1971, ss. 9, 14; and of course his liability to maintain the child would remain (Affiliation Proceedings Act 1957). For a discussion of the question of recognition of the illegitimate child by the father, see (1968) 17 I.C.L.Q. (Prof. D. Lasok). See also *Fatherless by Law?* (Church Information Office, 1966).

The actual meaning of guardianship, whether natural, testamentary or judicial, is obviously in need of clarification. It would be desirable for statute to spell out the various rights and duties of a guardian, and also to make clear the position of each parent if a custody order, both with and without care and control, is made in favour of one of them (and of both if the order is in favour of a third person).²⁶ A statutory solution is also needed for the problem which can arise if a person in whose favour a custody order had been made dies while the child is still a minor and without, in the case of a parent, having appointed a testamentary guardian; for in this situation, particularly if the custodian was married to someone who is not a blood relation of the child, the latter may now be at risk.²⁷ Ideally it should be ensured that the case is automatically referred back to the court for a further order in such an eventuality, but the actual machinery to achieve this might prove very difficult to devise.²⁸

There are two further points of doubt concerning guardianship which need to be settled. The first concerns the effect of the marriage of a sixteen- or seventeen-year-old minor on guardianship. It has long been considered that natural guardianship comes to an end if a daughter marries while under the age of majority,²⁹ and there are reasons for thinking that this is true of a son as well.³⁰ On the other hand such authority as there is indicates that a testamentary guardianship of a male ward continues after his marriage,³¹ and that a

²⁶ Particularly obscure is the position of the custodian with regard to the child's property. Custody in the wide sense is said to include "the administration of the infant's property" (*Hewer v. Bryant* [1970] 1 Q.B. 357, 373B); yet not even the father as natural guardian of the child can give a valid receipt for a legacy given to the child: *Dagley v. Tolferry* (1715) 1 P.Wms. 285; Snell, *Principles of Equity*, 26th ed. (1966), pp. 386, 586.

²⁷ At present the natural guardian of the child could claim it unless a declaration of unfitness had been made by the court under s. 18 (3) of the Matrimonial Proceedings and Property Act 1970 (which is very rare in practice) or unless the child is made a ward of court. See (1966) 9 J.S.P.T.L. 201, 235.

²⁸ This is really part of the wider problem of the need for some on-going control of the situation in order to render more effective the principle contained in what is now s. 17 of the Matrimonial Proceedings and Property Act 1970. See Law Commission Working Paper No. 15 (written by the Cambridge University Faculty of Law).

²⁹ The authority often cited for this is a dictum of Lord Hardwicke L.C. in *Mendes v. Mendes* (1748) 1 Ves.Sen. 89, 91, though this dictum does not appear in the report at 3 Atk. 619; moreover it appears to be concerned with testamentary guardianship.

³⁰ See *R. v. Inhabitants of Wilmington* (1822) 5 B. & Ald. 525, 526, where Abbott C.J. observed that "during the minority of a child there can be no emancipation unless he marries . . ." But this case was concerned with the power of magistrates to order the removal of a pauper from their parish. In *Lough v. Ward* [1945] 2 All E.R. 338, 348, Cassels J. stated roundly that "the father . . . has control over his children . . . until they are 21 years of age or marry under that age."

³¹ *Eyre v. Countess of Shaftesbury* (1724) 2 P.Wms. 103. The position if a female ward of a testamentary guardian marries is uncertain, but cf. n. 29 *supra*, and see Johnson, *Family Law*, 2nd ed. (1965), p. 303.

judicial guardianship of a female ward also so continues.³² There is surely a great deal to be said for adopting a uniform rule for both sexes and for all kinds of guardianship; and moreover for suspending rather than terminating the guardianship, as there is always a possibility that the marriage may end (through death, annulment or even divorce) before the age of majority is reached.³³

The other point concerns the enforcement of parental rights against the wishes of the child. Whereas it has long been settled that *habeas corpus* proceedings brought by a parent to recover a daughter of sixteen or more will fail if she does not wish to return,³⁴ dicta suggest that the relevant age in the case of a son is fourteen.³⁵ It seems difficult today to justify different "ages of discretion" for girls and boys, though the matter is not perhaps of great moment because ward of court proceedings may still be instituted in either case until the age of majority is reached.³⁶

These then are the matters to which Parliament could profitably give its attention if it is felt, as it surely should be, that the time has come to place the law relating to guardianship on a more satisfactory basis.

In this article an attempt has been made to describe the steady decline of parental rights during the last half century, a trend which many will regret, though some will applaud. But in so far as the law has become increasingly concerned with securing the best solution from the point of view of the child, it is surely a development which must command respect; for it was in its almost brutal indifference to the child's fate that the former English law of domestic relations was so woefully defective. This has largely been rectified. What would be welcome now would be a statutory reformulation of parental rights, as well of course as parental duties.³⁷ This would provide the surest answer to the rather bizarre suggestion recently made that children "need a charter to protect them against the constant violation of their basic rights by adults."³⁸

³² *Roach v. Garvan* (1748) 1 Ves.Sen. 157. See Eversley, *op. cit.*, pp. 466-467.

³³ As is the case apparently if a minor enlists in the Armed Services: *R. v. Inhabitants of Rotherfield Greys* (1823) 1 B. & C. 345.

³⁴ *R. v. Howes* (1860) 3 El. & El. 332.

³⁵ *Re Agar-Ellis* (1883) 24 Ch.D. 317, 326 *per* Brett M.R.; *Re Thomasset* [1894] P. 395, 398 *per* Lindley L.J.

³⁶ For a valuable account of the actual practice in wardship proceedings see (1967) 83 L.Q.R. 201 (Sir Geoffrey Cross).

³⁷ It seems for example that at present a mother, unlike a father, is not always under a legal duty to provide her child with a home: see *Morris v. Tarrant* [1971] 2 Q.B. 143, 155B, *per* Lane J.

³⁸ This suggestion was made by the Advisory Centre for Education: *The Times*, 8 April 1971. See also the suggestion that "a children's Ombudsman" be appointed: *Children Have Rights*, No. 5, published by the Children's Committee of the National Council for Civil Liberties, September 1971.

THE CONSTITUTION OF THE UNITED KINGDOM

D. G. T. WILLIAMS

WHY not, we are asked, establish a permanent reconciliation between England and Ireland by the conversion of the United Kingdom into a federalised kingdom whereof England, Scotland, Ireland, and Wales, and, for aught I know, the Channel Islands and the Isle of Man, shall form separate states? This new constitutional idea of the inherent excellence of federalism is a new faith or delusion which deserves examination.¹

Professor Dicey, who wrote those words over fifty years ago, would have been interested to learn that a Commission on the Constitution was appointed in 1968 to consider whether any constitutional or economic changes are desirable in relation to the various countries, nations and regions of the United Kingdom; and also to consider whether any changes are desirable in the constitutional and economic relationships between the United Kingdom and the Channel Islands and the Isle of Man. A federal solution is by no means the only one (apart from retaining the status quo) which the Commission could recommend, and its proposals will have to be made against a background of pending changes in the structure of local government² and of the long-term implications of this country's relationship with Europe. Dicey would nonetheless have been keenly aware of what is today, as in 1914, an apparent threat to the unitary constitution of the United Kingdom and to the principle of parliamentary sovereignty. He would certainly have rejected federalism—which he saw as “absolutely foreign to the historical and, so to speak, instinctive policy of English constitutionalists”³—within the bounds of the United Kingdom. He would still have represented what has been described as “a characteristic British bias in favour of federalism—a bias which, however, corrects itself north of the English Channel.”⁴

The Home Rule movement of the early years of this century was, of course, principally a symptom of the Irish problem. The enactment of the Government of Ireland Act 1920 provided for two subordinate legislatures in Dublin and Belfast, but the proposed scheme of government was never fully implemented. Ireland had been parti-

¹ *Law of the Constitution* (8th ed., 1915), p. lxxiv.

² See, e.g., *Local Government in England: Government Proposals for Reorganisation*, Cmnd. 4584 (February 1971).

³ *Law of the Constitution*, xc.

⁴ S. A. de Smith, *The New Commonwealth and its Constitutions* (1964), p. 254. See Dicey at pp. lxxxvii-lxxxviii.

tioned by 1922; the Six Counties of the north remained subject to the Government of Ireland Act, while the remainder became independent. Since 1949 the Republic of Ireland has not even been a member of the Commonwealth. Events since 1968 have made it abundantly clear, however, that the Irish problem has not been solved by partition. There is no shortage of advocates either of a reunified Ireland⁵ or of closer co-operation between north and south.⁶ In theory at least, there would be much to be said for a reunified Ireland under a single legislature but linked on a federal basis to the United Kingdom under a supreme constitution.⁷ Reunification outside the United Kingdom would doubtless be unacceptable to the majority in Northern Ireland, who would be anxious to stress the affirmation in the Ireland Act 1949 "that in no event will Northern Ireland or any part thereof cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland." Whether such a provision is legally binding on Parliament at Westminster is open to considerable doubt, but Calvert has rightly suggested "that should the issue ever arise, it is likely that considerations of legality will play but a small part in the determination of it."⁸ Political considerations would be dominant, and in the course of time it may be that British and Irish entry to the wider community of Europe would make the prospect of a revived united country of Great Britain and all Ireland less of a constitutional wrench.

In the immediate future the province of Ulster will continue to be the centre of attention. With its own legislature at Stormont, its own executive and its own judiciary and legal system, it is the nearest approach in this country to a state or region within a federation. In its written evidence for the Commission on the Constitution, the Home Office said that Northern Ireland "is a natural point of reference in any discussion of a system of regional government within the United Kingdom."⁹ The Government of Ireland Act has been consistently looked upon as a constitutional document rather than a mere statute. In *Belfast Corporation v. O.D. Cars Ltd.*, for instance, Viscount Simonds (in the course of a case concerning the validity of a statute passed at Stormont) commented that it is right

⁵ See "Rough Passage to a United Ireland" (A. P. Ryan), *The Times*, 13 August 1971, p. 10; "Time for a United Ireland" (John Whale), *Sunday Times*, 30 May 1971, p. 12.

⁶ See "How I would solve the Irish Problem" (Quintin Hogg), *Sunday Express*, 24 August 1969, p. 14; *The Listener* (Quintin Hogg), 18 September 1969, pp. 363-364.

⁷ See esp. the views of Mr. Harold Wilson in H.C. Vol. 826, col. 1571 *et seq.* (25 November 1971). See also the views of Mr. William Craig in *The Times*, report, 27 October 1969, p. 2.

⁸ Harry Calvert, *Constitutional Law in Northern Ireland* (1968), p. 33.

⁹ Written Evidence 3 (Commission on the Constitution), p. 1. See G. W. Keeton, "United or Disunited Kingdom" (1969) C.L.P. 29.

that, in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents. The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges among the English-speaking people overseas have dealt with kindred problems.¹⁰

It is true that section 75 of the Government of Ireland Act formally preserved the supreme authority of the Parliament of the United Kingdom over affairs in Northern Ireland, but the original intention was nevertheless "that Ulster should enjoy virtual autonomy within the sphere of internal affairs, subject only to the long-stop function of Westminster should powers be abused."¹¹ Tact and caution on the part of both Westminster and Whitehall led to at least the appearance of autonomy in Ulster's internal affairs,¹² though in practice the constitutional status of the province has been difficult to define.¹³ The role of the Home Secretary in London has in the past few years underlined the fact that Ulster is in truth an experiment in devolution—not in federalism.¹⁴ Faced with the disorders since 1968, Belfast has had little option but to co-operate with London not only in the attempts to restore law and order (which could occur in a federal situation) but also in the undertaking of reforms in governmental and other spheres of activity in Northern Ireland. In a different political and social context it is very possible that a real federal relationship would have evolved. This could scarcely be expected in a situation where, in the words of the Cameron Report, the Catholics have a continuing "sense of resentment and frustration at the failure of representations for the remedy of social, economic and political grievances" and the Protestants have "equally deep-rooted suspicions and fears of political and economic domination by a future Catholic majority in the population."¹⁵ The Hunt Report commented that the

¹⁰ [1960] A.C. 490, 518, H.L.

¹¹ Harry Calvert, "Northern Ireland—What Went Wrong?" in *Welsh Studies in Public Law* (ed. J. A. Andrews, 1970), p. 92. See *A Record of Constructive Change* (White Paper, Belfast, Cmd. 558 of 1971); *The Future Development of the Parliament and Government of Northern Ireland* (Consultative Document, Cmd. 560 of 1971).

¹² See, e.g., Donaldson, "The Constitution of Northern Ireland" (1955) 11 Univ. of Toronto L.J. 1, 29; J. P. Mackintosh, *The Devolution of Power* (1968), 177 *et seq.*

¹³ See Calvert in Chap. 4 of *Constitutional Law in Northern Ireland*, and Chap. 6 of *Welsh Studies in Public Law*. In *Modern Federalism* (1969) Geoffrey Sawer says (at p. 57) that the Government of Ireland Act created "an odd sort of federal situation."

¹⁴ See K. C. Wheare, *What Federal Government Is* (1941), pp. 6–8.

¹⁵ *Disturbances in Northern Ireland*, Cmd. 532 (Belfast, September 1969), para. 126.

"problems of keeping the peace in Northern Ireland are peculiarly difficult because of the deep sectarian divisions of society, the part played over the years by the Irish Republican Army and its various splinter groups, and the militant character of the extreme Protestants."¹⁶ It is indeed conceivable that factors such as these could result in a reassertion of direct rule from London.¹⁷ They certainly make it unwise at the present time to assess the possibilities of greater devolution within the United Kingdom by reference to fifty years' experience in Northern Ireland;¹⁸ in evidence presented to the Commission on the Constitution it was stressed that "the constitution of Northern Ireland was adopted, not because regional government was held to be right in itself, but as part of the general settlement of the Irish problem"¹⁹ and that the "constitutional development of Northern Ireland has been profoundly influenced by factors which are unlikely to have effect elsewhere in the United Kingdom."²⁰

Totally different factors have influenced the constitutional relationship between Scotland and England.²¹ The Union of 1707 achieved complete political union between the two countries, but from the outset Scotland has retained its own separate legal system. Some writers have strongly urged that certain terms of the Union, which purported to be unalterable, amount to a form of fundamental law and are binding upon Parliament at Westminster.²² The implication of such an argument is that there already exists the germ of a supreme constitution: and it is upon a supreme constitution that one could erect a federal relationship between Scotland and the national legislature in London. But the arguments in favour of fundamental law, in spite of their judicial airing in *MacCormick v. Lord Advocate*,²³ are historically uncertain and unlikely in themselves to lead to an assumption of judicial review of legislative action either by English or Scottish courts. It may be true that the pre-1707 Scottish Parliament "almost at all times acknowledged some power which restrained or competed with parliamentary authority":²⁴ this does not necessarily

¹⁶ Report of the Advisory Committee on *Police in Northern Ireland*, Cmd. 535 (Belfast, October 1969), para. 21.

¹⁷ See Richard Rose, "Ulster: the problem of Direct Rule," *New Society*, 10 June 1971, pp. 998-999.

¹⁸ See C. E. Brett, "Regional parliaments: the lessons of Stormont," *The Times*, 1 April 1970, p. 9.

¹⁹ Written Evidence 3, p. 1 (Home Office evidence).

²⁰ Minutes of Evidence III, Memorandum of the Ulster Unionist Council, p. 45. See also, *The United Kingdom. The Development of its Law and Constitutions (England and Wales, Northern Ireland, the Isle of Man)*, Chap. 19 (by L. A. Sheridan), p. 431.

²¹ See generally, J. D. B. Mitchell, *Constitutional Law* (2nd ed., 1968).

²² See, e.g., T. B. Smith, "The Union of 1707 as Fundamental Law" [1957] *Public Law* 99.

²³ 1953 S.C. 396.

²⁴ Dicey and Rait, *Thoughts on the Union between England and Scotland* (1920), p. 22.

mean, however, that the principle of the unlimited sovereignty of Parliament "is a distinctively English principle which has no counterpart in Scottish constitutional law."²⁵ At the time of the Union the English courts were themselves but a few years distant from the constitutional events of the seventeenth century, a period in which there had been judicial assertions of inalienable prerogative powers which could not be impinged upon by Parliament or anyone else.²⁶ It was also a period which began with Coke C.J.'s dictum, the source of so much constitutional discussion on the other side of the Atlantic, in *Dr. Bonham's Case*.²⁷ Any doctrine of parliamentary supremacy—at least in the manner in which it was developed by Dicey—is surely a reflection of political events well after 1707.²⁸ The statesmen of 1707 doubtless intended that the relevant provisions in the terms of the Union should be genuinely unalterable, but the establishment of the sovereignty of the United Kingdom Parliament, if it is a later development, left no room for exceptions. In Maitland's view there was so much insistence upon the essential conditions of the Union "that we may say that the act goes near to an attempt to make law which no future parliament shall alter—goes near to such an attempt, but is definitely not guilty of it. It soon became the established doctrine that these provisions, like every other part of the law of England and Scotland, could be repealed by the parliament of the United Kingdom."²⁹

The prospects of federalism or greater devolution in Scotland are largely unaffected by the perhaps academic arguments about the terms of the Union, save insofar as they might weaken concern about preserving the ultimate supremacy of Parliament at Westminster if a representative legislative body were to be created for the Scots. The idea of such a body has been brought up frequently in the last few years. It appeared in Mr. Heath's so-called "Declaration of Perth" in May 1968 and was adopted in one form in the report of Sir Alec Douglas-Home's Committee which reported in 1970.³⁰ A Scottish Convention based in Edinburgh, which was envisaged by that Report, was not intended to compete with Parliament. The impetus for such an institution, if it were to emerge, comes less from suspicion of Westminster than from suspicion of Whitehall. It would be a further step in a process of administrative devolution relating to Scotland which has been more significant than anywhere else in Great Britain.

²⁵ *MacCormick v. Lord Advocate* 1953 S.C. 396, 411.

²⁶ See Keir and Lawson, *Cases in Constitutional Law* (5th ed., 1967), pp. 1-2.

²⁷ (1610) 8 Co.Rep. 114a. See further, n. 72 below.

²⁸ See Hood Phillips, *Constitutional and Administrative Law* (4th ed., 1967), p. 66; Mitchell, *Constitutional Law* (2nd ed., 1968), p. 89.

²⁹ *The Constitutional History of England* (1908), p. 332.

³⁰ See *The Times*, 20 May 1968, p. 3; *Daily Telegraph* (leading article), 20 March 1970, p. 18; J. P. Mackintosh, *The Devolution of Power* (1968), pp. 169-170.

So far as the Conservative and Labour Parties are concerned, the line between legislative and administrative devolution is important. In its manifesto for the General Election of 1970, the Conservative party recognised the need to devolve government power and referred to the "distinct identity, traditions and legal system" of Scotland as factors underlying the proposal for a Scottish Convention.³¹ The Labour party's manifesto rejected the idea of any separate legislative assembly; it included a general statement in favour of changes leading to more effective government in Scotland—provided they would not "destroy the integration of the U.K. or weaken Scotland's influence at Westminster."³² Evidence before the Commission on the Constitution has set out in detail the extent to which there is already a fair measure of administrative devolution in respect of Scotland³³—many of the developments have in fact occurred within the past fifty years—and, in the immediate future, there is the prospect of important changes in the structure of local government in Scotland as well as elsewhere in Great Britain.³⁴ For the time being neither major party is likely to embrace specific proposals for a federal relationship between Scotland and Westminster: much depends upon the recommendations of the Commission on the Constitution which, in their turn, will have to be assessed against the implications of British entry into Europe. But there is continuing pressure for greater devolution. The acceptance of the need for larger regional authorities in local government must encourage those who hope for wider provincial areas equipped with their own subordinate legislative bodies and their own executives.³⁵

Proposals for reform in local government throughout Great Britain appeared at a bewildering pace throughout the decade between 1960 and 1970. They related to a system of local government which had remained substantially unchanged since the burst of reforms in the later nineteenth century. It was the decade of Herbert, of Redcliffe-Maud (and Maud), of Wheatley, of Plowden, of Willink, of Seeböhm, and of countless other reports combined with white and

³¹ "A Better Tomorrow," p. 24.

³² "Now Britain's strong let's make it great to live in," p. 22.

³³ See Written Evidence 2—The Scottish Office, Lord Advocate's Department and the Crown Office (H.M.S.O. 1969); Minutes of Evidence II (H.M.S.O. 1970). Annex I of Written Evidence 2 at 47–49 provides a useful historical survey.

³⁴ See *Reform of Local Government in Scotland*, Cmnd. 4583 (February 1971).

³⁵ See Mackintosh, *The Devolution of Power* (1968), esp. Chap. 9; J. C. Banks, *Federal Britain? The Case for Regionalism* (1971). For a different approach to problems of devolution, see J. D. B. Mitchell in Chap. 5 ("Government and Public Law in Scotland") of *Welsh Studies in Public Law* (1970). It might be noted in passing that the area of Scotland will be extended by the Island of Rockall Bill 1971—see H.C., Vol. 828, col. 189 *et seq.* (13 December 1971); H.L., Vol. 325, col. 750 *et seq.* (18 November 1971).

green papers.³⁶ Those which relate to England alone remind us that problems of government and devolution are by no means the exclusive concern of the other parts of the United Kingdom. Indeed the Report of the Royal Commission on Local Government in Greater London in 1960 could be regarded as the starting off point in a process of reform that has gathered momentum in the 1960s and is likely to bear fruit in the next decade. The Royal Commission described London as an area which "differs from the conurbations in the rest of the country by reason of its size, density of population, history of growth and the overriding predominance of its one centre"³⁷ and declared that "the choice before local government in Greater London is, in truth, to abdicate in favour of central government, or to reform so as to be equipped to deal with present-day problems."³⁸ The creation of the new Greater London Council was achieved by the London Government Act 1963: Sir Keith Joseph (the Minister of Housing and Local Government) said during the parliamentary proceedings that the Council would "be one of the major local authorities in the world, if not the major authority."³⁹ Some years later the Royal Commission on Local Government in England favoured the idea of the provincial council to "handle the broader planning issues, work out provincial economic strategy in collaboration with central government and be able to act on behalf of the whole province."⁴⁰ Legislative proposals for the implementation of the Royal Commission's recommendations for provincial or regional government have been deferred pending the report of the Commission on the Constitution, but white papers published by both Labour and Conservative governments have been broadly sympathetic.⁴¹ It is clear that the future development of regional government is not regarded as inconsistent with much earlier legislative reforms in the more orthodox areas of local government.

An area which would, like Scotland, have special prominence in any move towards extended regional government is Wales and Monmouthshire. It was Edward I who "conceived the great design of annexing all other parts of the island of Great Britain to the realm of England"⁴² and succeeded in bringing Wales "under the general comprehension of the British Empire."⁴³ The constitutional relation-

³⁶ See D. G. T. Williams in Chap. 8 ("The Control of Local Authorities") of *Welsh Studies in Public Law* at 117-118.

³⁷ Cmnd. 1562, para. 279.

³⁸ Para. 707.

³⁹ H.C., Vol. 675, col. 314 (2 April 1963).

⁴⁰ Cmnd. 4040 (June 1969), para. 13. The terms of reference of the Royal Commission did not include Greater London.

⁴¹ *Reform of Local Government in England*, Cmnd. 4276 (February 1970), para. 12; *Local Government in England*, Cmnd. 4584 (February 1971), paras. 35-37.

⁴² *R. v. Cowle* (1759) 2 Burr. 834; 97 E.R. 587 at 850, 596 (Lord Mansfield).

⁴³ *Campbell v. Hall* (1774) Loft 655; 98 E.R. 848—argument of counsel at 689, 868. See also *Lamplsey v. Thomas* (1747) 1 Wils.K.B. 193; 95 E.R. 568.

ship between the two countries remained unsettled, however, until, appropriately enough, the Tudors came to the throne. It was by virtue of legislation between 1536 and 1542 that complete political union was secured.⁴⁴ A Welsh system of courts (applying the English common law)—the Courts of Great Sessions—remained in existence until, after constant encroachment from the courts at Westminster, it was finally abolished in 1830. In all other respects the Union was intended to be total, so much so that in law England was—as a declaratory statute of 1746 affirmed⁴⁵—deemed to include Wales. It is only in the last hundred years that it has become common practice to refer to England and Wales expressly in statutes, and the first enactment to treat Wales separately was apparently the Sunday Closing Act 1881.⁴⁶ The anomalous position of Monmouthshire, incidentally, was originally accounted for in part by the fact that it was closer to London and could be more conveniently incorporated within the English system of courts.⁴⁷ Proximity to London may also explain why it was allowed representation in Parliament by two knights of the shire rather than the one assigned to the other twelve counties. For ecclesiastical purposes Monmouthshire has always been part of Wales. The entire so-called border between England and Wales was arbitrary and, in political terms, intended to be unimportant in view of the attempt to incorporate Wales within England rather than attach any special constitutional status to the twelve counties.⁴⁸ James I had the legislation of 1536–42 very much in mind when he advocated union between England and Scotland at the opening of his first English Parliament in 1604:

Do we not yet remember that this kingdom was divided into seven little kingdoms, besides Wales? And is it not now the stronger by their union? And hath not the union of Wales to England added a greater strength thereto? Which, though it was a great principality, was nothing comparable in greatness and power to the ancient and famous kingdom of Scotland.⁴⁹

In the event, of course, union between England and Scotland was formally negotiated by two independent countries: there was no question of incorporation but rather of the joining of the two into a new kingdom.⁵⁰ Elements of separateness were allowed to Scotland by

⁴⁴ See (Prof.) David Williams, *A History of Modern Wales* (1950), Chap. 3.

⁴⁵ Wales and Berwick-on-Tweed Act 1746. See *Nicol v. Verelst*, 2 Black.W. 1277; 96 E.R. 751 at 1287, 755 (Blackstone J.).

⁴⁶ See Commission on the Constitution, Written Evidence 1, p. 1.

⁴⁷ Williams, *A History of Modern Wales*, pp. 39–41.

⁴⁸ J. F. Rees, *Studies in Welsh History* (1947), pp. 40–41; Harold Carter in Chap. 3 ("Local Government and Administration in Wales 1536–1939") of *Welsh Studies in Public Law* (1970).

⁴⁹ See J. R. Tanner, *Constitutional Documents of the Reign of James I* (1960), p. 26. See also, J. F. Rees, *Studies in Welsh History*, pp. 27–28.

⁵⁰ See *R. v. Lister*, Sess.Cas. 190; 93 E.R. 192 at 190, 192.

the terms of the Union to an extent not remotely approached in the case of Wales. Wales has consistently lagged behind Scotland in administrative devolution, though the gap has closed somewhat in this century.⁵¹ The office of Minister for Welsh Affairs, for instance, was created in 1951, and a Secretary of State for Wales emerged in 1964; Scotland, by contrast, had a Secretary for Scotland from 1885 and a Secretary of State from 1926. In Parliament itself there is no Welsh peerage (all holders of Scottish peerages now, by virtue of the Peerage Act 1963, sit in the House of Lords) but the Standing Orders of the House of Commons have provided for a Welsh Grand Committee along the lines of the Scottish Grand Committee. The decentralisation of ordinary departmental work came surprisingly late: the creation of the Welsh Board of Health of 1919 has been described as "the first significant devolution of the authority of a Government Department to Wales."⁵² Steady consolidation of devolution since that date is attributable in no small way to the wide survival of the Welsh language, and it is on the linguistic side that Wales differs most obviously from other parts or regions of the United Kingdom. The particular problems of bilingualism have been the concern of important recent reports,⁵³ and positive efforts have been made in the Welsh Courts Act 1942 and the Welsh Language Act 1967 to raise the status of the Welsh language.⁵⁴ The latter statute, incidentally, provides that Wales is henceforth a separate entity in law and no longer deemed to be part of England.

Proposals for federal government have been made in respect of Wales as well as of Scotland. Once again, however, the immediate concern is with local government. White papers were published in 1967 and 1970,⁵⁵ and these were followed by a Consultative Document in February 1971 containing the latest plans designed to ensure that the Welsh people "have the right to the kind of local government which meets the needs of Wales in the second half of the twentieth century and in which they can participate effectively and to the full."⁵⁶ Considerations of regionalism must await the deliberations of the Commission on the Constitution.

⁵¹ See generally, Written Evidence 1 and 2 (Commission on the Constitution).

⁵² Ivor Gowan, *Government in Wales* (pamphlet, inaugural lecture 1966), p. 5. See also Gowan in Chap. 4 ("Government in Wales in the Twentieth Century") in *Welsh Studies in Public Law* (1970).

⁵³ e.g., Report of Committee on the *Legal Status of the Welsh Language*, Cmnd. 2785 (October 1965); *Primary Education in Wales* (a report of the Central Advisory Council for Education (Wales)) (H.M.S.O.) (1967).

⁵⁴ See also, *Evans v. Thomas* [1962] 2 Q.B. 350, and *R. v. Merthyr Tydfil JJ.*, ex p. *Jenkins* [1967] 2 Q.B. 21.

⁵⁵ *Local Government in Wales*, Cmnd. 3340 (July 1967); *Local Government Reorganisation in Glamorgan and Monmouthshire*, Cmnd. 4310 (March 1970). See J. E. Trice, "Welsh Local Government Reform: An Assessment of Ad Hoc Administrative Reform" [1970] *Public Law* 277.

⁵⁶ *The Reform of Local Government in Wales* (H.M.S.O., February 1971), para. 1.

The Commission on the Constitution is concerned with the Channel Islands and the Isle of Man as well as with the United Kingdom proper. The islands of Jersey and Guernsey (together with Alderney and Sark) and the Isle of Man enjoy a curious constitutional status, but it is a status which urgently demands reappraisal in the light of this country's future relationship with Europe. The explanation of their status is historical.⁵⁷ In the eighteenth century, for instance, Lord Hardwicke said of Jersey that she "must be as much considered a foreign country in respect to the laws of England as if it were not parcel of the Crown of England, for it is no part of the kingdom of Great Britain, but is a distinct dominion, which the King of Great Britain is intitled to in right of his Duchy of Normandy, and consequently governed by the laws of Normandy."⁵⁸ The island's association with the United Kingdom has been described by a recent writer as "a largely undefined and highly volatile and sensitive relationship"⁵⁹; the same writer has also concluded that the exact nature of the constitutional relationship between the Isle of Man and the United Kingdom "is still uncertain in some important respects."⁶⁰ Jersey, Guernsey and the Isle of Man each possesses its own legislature, its own executive, its own courts and its own law. The Home Secretary in London is responsible for liaison with the islands as he is with Northern Ireland. Despite all the constitutional ambiguities, however, it has long been assumed that the Parliament of the United Kingdom is supreme even over the Channel Islands and the Isle of Man,⁶¹ though in practice a considerable measure of local autonomy is permitted. It remains to be seen how far the nature and extent of such autonomy can survive the adoption of federal or strong regional government within the United Kingdom or the entry of the United Kingdom to the European Economic Community.

The advocates of Home Rule All Round some fifty and more years ago would doubtless be disappointed by the extent to which government has remained centralised within the United Kingdom, especially since Northern Ireland can be regarded as a constitutional accident rather than as a product of some irresistible move towards federalism

⁵⁷ See the two volumes of *The United Kingdom. The Development of its Laws and Constitutions* (1955): Chap. on the Channel Islands (L. A. Sheridan) and Chap. on the Isle of Man (D. C. Holland).

⁵⁸ *Pipon v. Pipon* (1744) 9 Mod. 431; 88 E.R. 554 at 436, 557.

⁵⁹ K. R. Simmonds, "The British Islands and the Community: 1. Jersey" (1968) 6 C.M.L.R. 156 at 156.

⁶⁰ K. R. Simmonds, "The British Islands and the Community: 2. The Isle of Man" (1970) 7 C.M.L.R. 454, 455. Professor Simmonds will be publishing a third article on Guernsey.

⁶¹ See L. A. Sheridan, *op. cit.*, *supra*, at p. 1144; D. C. Holland, *op. cit.*, *supra*, at 486. See also the Attorney-General in *Pipon v. Pipon* at pp. 433, 555: "The laws of Jersey are separate, distinct, and independent of the laws of England, though not of the Legislature of England."

or regionalism. Then as now, of course, the Channel Islands and the Isle of Man have enjoyed a tenuous semi-federal status. But the advocates of Home Rule would derive some satisfaction from the revived interest in devolution in the last few years. Some of the impetus has come from Scottish and Welsh nationalists.⁶² Support for substantial devolution is, however, broadly based: though there must be a great variety of opinion as to the extent to which devolution is either desirable or feasible. The convenient yardstick for assessment is a federal system of government.

There is no precise definition of federalism or federation. Livingston noted simply that federalism "is what political scientists talk about when they talk about federalism"⁶³; and Jennings once wrote that federation "is nothing more than the name of a complicated system of government which nobody would wish to see established anywhere if he could think of a better."⁶⁴ K. C. Wheare had the British reader in mind when he wrote in 1941:

What then is federalism? Its essence consists, I think, in this: that in a federal system, the functions of government are divided in such a way that the relationship between the legislature which has authority over the whole territory and those legislatures which have authority over parts of the territory is not the relationship of superior to subordinates as is the relation of the Parliament at Westminster to the Parliament at Stormont, but is the relationship of co-ordinate partners in the governmental process.⁶⁵

Legislative power in the United Kingdom is distributed among many bodies—from Parliament at Stormont to local authorities exercising statutory authority to make by-laws. But the ultimate supremacy of Parliament is theoretically intact. There is no constitutional scheme superior to Parliament. A written, supreme constitution would have to be adopted if the distribution of legislative power to major regional bodies needed to be guaranteed from encroachments by Westminster. Such a constitution would need to be interpreted and enforced: the courts would either be expressly accorded or would have to assume the role of arbiters and exercise judicial review of legislative action by the national and by regional

⁶² See (Prof.) Thomas Wilson, "Constitutional implications of home rule all round," *The Times*, 16 November 1967, p. 11; J. P. Mackintosh, "Nationalist Eyes on Ulster's system," *The Times*, 6 August 1968, p. 7; report in *The Times*, 28 September 1968, p. 1 (speech by Mr. Enoch Powell).

⁶³ William S. Livingston (ed.), *Federalism in the Commonwealth: A Bibliographical Commentary* (1963), pp. xvi-xvii. See G. Sawyer, *Australian Federalism in the Courts* (1967), Chap. 1; K. C. Wheare, *Federal Government* (4th ed., 1963), Chap. 1; Dicey, *England's Case Against Home Rule* (3rd ed., 1887), pp. 160-161.

⁶⁴ Ivor Jennings, *A Federation for Western Europe* (1940), p. 3. See G. Sawyer, *Modern Federalism* (1969), Chap. 1.

⁶⁵ *What Federal Government Is* (pamphlet issued by Federal Union, 1941), pp. 9-10.

legislatures. A procedure for amending the constitution would also have to be provided.

Dicey was profoundly sceptical about the alleged need for a federal solution in the United Kingdom.⁶⁶ He felt that there was no genuine "federal spirit" and he feared that federal government would lead to a feeling of divided allegiance. The development of this country, in his view, had been from the time of Edward I in the direction of closer political unity. In his various writings on the subject of Irish Home Rule, he made it abundantly clear that he feared anything which would threaten parliamentary sovereignty. In response to the first Home Rule Bill of 1886, he wrote: "Under all the formality, the antiquarianism, the shams of the British constitution, there lies latent an element of power which has been the true source of its life and growth. This secret source of strength is the absolute omnipotence, the sovereignty, of Parliament."⁶⁷ Opponents of federalism, today as in Dicey's day, tend to stress the rigidity and conservatism resulting from a supreme constitution, the weakening of government when legislative powers are dispersed, and the over-elaboration of administration caused by the duplication of institutions and services. They are prepared to pay due respect to federations elsewhere, but are happy to note that it is over three hundred years since Oliver Cromwell, in his Instrument of Government, made a short-lived effort to impose a supreme constitution upon England, Scotland and Ireland.

The adoption of a supreme constitution is, for reasons other than federalism, being urged by those concerned with the guaranteed protection of human rights: though, of course, a federal constitution would be a convenient vehicle for introducing a Bill of Rights in this country. There has been growing pressure during the 1960s, not simply for an attenuated Bill of Rights along Canadian lines⁶⁸ but for a properly entrenched enumeration of fundamental freedoms.⁶⁹ The United Kingdom has in the last few years both

⁶⁶ See *Law of the Constitution*, Chap. 3.

⁶⁷ *England's Case Against Home Rule* (3rd ed., 1887), p. 168.

⁶⁸ See Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland, Cmnd. 1148 of 1960, Chap. 12.

⁶⁹ See Anthony Lester, *Democracy and Individual Rights* (Fabian Tract, 1969); de Smith, *The New Commonwealth and its Constitutions* (1964), Chap. 5; Anne Pallister, *Magna Carta: the Heritage of Liberty* (1971), Chap. 7; John Carson, "Towards a Rights Guarantee for Britain" (1970) XVI N.Y. Law Forum 605; Quintin Hogg, *New Charter: Some Proposals for Constitutional Reform* (Conservative Political Centre, April 1969); J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed., 1967); *The Times*, 4 December 1970, p. 3 (report of lecture by Salmon L.J.), also at p. 13 (leading article); *The Times*, 14 May 1970, p. 2, and 17 July 1969, p. 3 (reports of speeches by Lord Shawcross); article in *The Listener*, 24 April 1969, p. 549 (Quintin Hogg); *The Times*, 25 June 1970, p. 9; *Spectator*, 10 January 1969, p. 33; 8 March 1968, p. 290; 29 March 1968, p. 399; 19 July 1969, p. 67.

accepted the right of individuals to petition against this country under the European Convention on Human Rights and the compulsory jurisdiction of the European Court of Human Rights. It has been suggested that these actions do in effect impose some limitations upon what Parliament can or cannot do.⁷⁰ An entrenched Bill of Rights would, of course, involve the exercise of judicial review by the English and other courts of the United Kingdom. The tentative and probably very occasional interventions of some international court created by treaty are less likely to evoke anxiety about constitutional threats than the entrusting to domestic courts of a blank cheque to protect certain fundamental freedoms even against the legislature itself. In this country the protection of civil liberties has hitherto been a political as well as a legal concern. An entrenched Bill of Rights would tip the balance towards protection through the courts. This may or may not be a good thing in the long term, but it would be wrong to underestimate the possible drawbacks of such a development. The limitations of the convention of ministerial responsibility have often been exposed, and the need to create an ombudsman (the Parliamentary Commissioner for Administration) was in itself a reflection of some of those limitations. Nevertheless recourse to a member of parliament (and possibly, in the future, to elected members of large regional authorities) is important in the context of civil liberties. It would be a pity if that avenue of redress were to be abandoned. Alleged violations of freedoms usually raise complex issues: some are best ventilated in the political arena, others in courts of law. The unpredictability of a mixed system of political and legal remedies is probably no greater than the unpredictability of legal remedies alone. A statutory but unentrenched enumeration of fundamental freedoms might well improve and extend the present role of the courts and at the same time leave unimpaired the alternative of a speedy and inexpensive remedy through political channels. A distinguished American judge once said:

I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the contrary, we rarely have a political issue made of any kind of invasion of

⁷⁰ See D. R. Gilmour, "The Sovereignty of Parliament and the European Commission of Human Rights" [1968] *Public Law* 62, 72; D. J. Harris, "The European Convention on Human Rights and English Criminal Law" [1966] *Crim.L.R.* 205, 266 (two-part article). See generally J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (1969).

civil liberty. . . . The attitude seems to be, leave it to the judges. Years after the event takes place, the judges make their pronouncement, often in the form of letting some admittedly guilty person go, and that ends the matter. In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics.⁷¹

The underlying problem either of an entrenched Bill of Rights or of an entrenched federal structure for the United Kingdom is judicial review. All too often the constitutional arguments tend to begin and remain on a theoretical level about the desirability or feasibility of impinging upon the sovereignty of Parliament. Everyone accepts that, in practice and for a multitude of reasons, there are severe limitations upon Parliament's freedom of action. Entrenchment involves identifying and making formal certain existing or new limitations. The first question is: how can such entrenchment be achieved? The second question is: how can such entrenchment be enforced? It is generally (and doubtless rightly) assumed that enforcement would have to be through the courts. That assumption raises a third question which, in the light of British constitutional history, is crucial: would the courts be ready, able and willing to take on the role of constitutional arbiters?

Constitutional judicial review is not unfamiliar in this country. It was Chief Justice Coke's dictum in *Dr. Bonham's Case*⁷² which, after all, was destined—for all its ambiguity—to become "the most important single source of the notion of judicial review,"⁷³ even if English lawyers could dismiss it as "an ill-judged excursus from the main current of English legal development, which fortunately came to nothing and left it to flow, majestic and unimpeded, to its predestined end in the modern doctrine of legislative sovereignty."⁷⁴ Royalist judges in the seventeenth century—such as Sir John Finch in *Hampden's Case*⁷⁵—had no doubt that statutes purporting to take away some of the King's special powers were void. It is true that in the eighteenth and nineteenth centuries the judges adopted a total

⁷¹ Robert H. Jackson, *The Supreme Court as a Political Institution* (1955), Harper Torchbook ed., 1963, pp. 81–82.

⁷² "And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void, for when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void" (1610) 8 Co.Rep. 118a.

⁷³ Corwin, *The "Higher Law" Background of American Constitutional Law* (originally in Harvard L.R., reprinted separately 1955), p. 57. See also Plucknett, "Bonham's Case and Judicial Review" (1926) 40 Harv.L.R. 30; Thorne, "Dr. Bonham's Case" (1938) 54 L.Q.R. 543; Berger, "Dr. Bonham's Case: Statutory Construction or Constitutional Theory" (1969) 117 U. of Pa.L.R. 521.

⁷⁴ Gough, *Fundamental Law in English Constitutional History* (1955), p. 32.

⁷⁵ (1637) 3 St.Tr. 825.

self-denying ordinance in the face of parliamentary claims. But the Judicial Committee of the Privy Council provided a convenient forum for interpreting what were in effect the constitutions of countries such as Australia and Canada; even in very recent times, in cases such as *Bribery Commissioner v. Ranasinghe*,⁷⁶ the Judicial Committee has had to make important constitutional judgments. Nearer home, the constitution of Northern Ireland entrusts to both the House of Lords and the Judicial Committee the authority to adjudge the validity of legislation at Stormont. In one case from Northern Ireland, Lord Atkin said that "questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar. . . ." ⁷⁷

Nevertheless, most British judges and the vast majority of British lawyers must have had little or no contact with the problems and workings of judicial review. The adoption of judicial review would certainly entail a considerable change in traditional legal attitudes. It would bring the courts openly into the political arena. In a Privy Council case from Australia, for instance, Lord Porter said that issue raised under section 92 of the Constitution "will often be not so much legal as political, social, or economic, yet it must be solved by a court of law." ⁷⁸ The involvement of the courts in broad political issues raises a serious question of democracy.⁷⁹ The public would need to be satisfied that major constitutional and political issues can be entrusted to unelected judges. It is possible that the appointment of judges and the structure of the legal profession would call for urgent and wide re-assessment as a preliminary to judicial review⁸⁰; and the independence of the judiciary from both the executive and the legislature would need to be reinforced.⁸¹ The deference of two centuries is unlikely to be discarded overnight. If judicial review is to work, the judges will need to acquire confidence in order to inspire confidence.

The judiciary would be reluctant to assert judicial review unless the method of entrenchment is in itself convincing. A statute alone (even if secured by and subject to amendment by a special majority in both Houses) might be very vulnerable if a succeeding Parliament went against it by ordinary legislation. It would seem that a statute

⁷⁶ [1965] A.C. 172.

⁷⁷ *Gallagher v. Lynn* [1937] A.C.863, 870.

⁷⁸ *Commonwealth of Australia v. Bank of N.S.W.* [1950] A.C. 235, 310.

⁷⁹ See Rostow, "The Democratic Nature of Judicial Review" (1952) 66 Harv.L.R. 193.

⁸⁰ See "The Case for a Written Constitution," *Spectator*, 8 March 1968, pp. 290-291 (Anthony Lewis).

⁸¹ See A. T. Mason, "Extra-Judicial Work for Judges: the Views of Chief Justice Stone" (1953) 67 Harv.L.R. 193.

purporting to set out a supreme constitution—in the form of a federal system or a Bill of Rights or both—ought to come into operation only if approved by a referendum; and amendments should also require at least confirmation by referendum. The idea of a referendum has received minority support on various occasions in this century; during the constitutional struggles in the years before 1914,⁸² in the course of disputes about free trade in the Conservative party in 1930,⁸³ over the last decade in relation to possible entry to the European Economic Community.⁸⁴ It has not been a popular suggestion. The traditional arguments for and against the device are well set out by Dicey and by Emden.⁸⁵ Referenda have been used in many other countries,⁸⁶ but the view expressed by both Mr. Heath and Mr. Wilson has been that they would be contrary to our constitutional practice.⁸⁷ Opponents of the referendum see it as a dangerous move from representative democracy to direct democracy,⁸⁸ and it has been urged in the recent debates on the Common Market that it would be difficult to frame a question satisfactorily, that it is unclear whether a referendum would be binding upon Parliament or merely advisory in effect, that the timing of a referendum would give undue power to the government of the day, and that as a constitutional device it “is extremely open to manipulation, tends to be favourable to autocracy and tends to be conservative in its effect.”⁸⁹ But

⁸² Horwill, “The Referendum in Great Britain” (1911) 26 Pol.Sci.Qu. 415; Cecil S. Emden, *The People and the Constitution* (2nd ed., 1956), p. 297 *et seq.*

⁸³ Earl of Birkenhead, “No Referendum!” in *Last Essays* (1930), Chap. 3.

⁸⁴ See Philip Goodhart, *Referendum* (1971). In the course of this book surveying the case for and against a referendum, the author says (at p. 189): “One of the few viable ways of ‘entrenching’ a Bill of Rights would be to submit the Bill to a referendum once it had been approved by both Houses of Parliament.” See Douglas Jay, “Joining the Six—the case for a referendum,” *The Times*, 1 August 1970, p. 13; St. John-Stewas, “Historical Case against a Referendum on Europe,” *The Times*, 12 June 1971, p. 14.

⁸⁵ Dicey, *Law of the Constitution* (8th ed., 1915), pp. xci-c. Dicey explained that the word referendum “is a foreign expression derived from Switzerland,” the strongest argument against it is that it entails “the transfer of political power from knowledge to ignorance,” the strongest argument for it is that it might “keep in check the inordinate power now bestowed on the party machine.” See Emden, *The People and the Constitution* (2nd ed., 1956), pp. 297-302.

⁸⁶ See, e.g., Gazey, “Direct Democracy—A Study of the American Referendum” (1970) xxiv Parl. Affairs 123; Harris, “The Rhodesian Referendum: June 20th 1969” (1969) Parl.Affairs 72.

⁸⁷ See H.C., Vol. 792, col. 199-200 (25 November 1969, Mr. Wilson); Vol. 820, col. 1514-1516 (8 July 1971, Mr. Heath). See also, Vol. 806, col. 835 (16 November 1970, Mr. Rippon).

⁸⁸ See Laski, *Parliamentary Government in England* (1938), p. 133; Marriott, *English Political Institutions: an Introductory Study* (4th ed., 1938), p. 228.

⁸⁹ The quotation is from a leading article in *The Times*, 1 August 1970, p. 13. See also, leading article in the *Observer*, 30 May 1971, p. 8. See generally on the Common Market arguments, correspondence in *The Times* for 27 May 1971, p. 17, and 3 June 1971, p. 15, and reports in *The Times*, 25 May 1971, p. 4 (Mr. Wedgwood-Benn urges a referendum), 8 June 1971, p. 5 (Sir Alec Douglas-Home against a referendum), 15 July 1971, p. 6 (Mr. Heath against a referendum), 21 January 1971, p. 6 (Sir Derek Walker-Smith for a referendum).

whether such arguments are relevant to the problem of entrenching a constitution within this country is questionable. The decision to adopt a supreme constitution could perhaps be interpreted as a deliberate modification of representative democracy. In practical terms a referendum may be the only means by which the courts of law could be vested with sufficient strength to stand up to Parliament in enforcing the constitution. It has the advantage of providing a definite (and "democratic") procedure for securing entrenchment while at the same time easing some of the difficulties of judicial review.

The difficulties of judicial review may well discourage efforts to create an entrenched Bill of Rights in isolation. They may also discourage federalism in the United Kingdom. Even short of federalism, however, the constitutional role of the courts may be extended to enable them to rule upon the validity of the legislation of large regional authorities in the same way that they can at present control the statutes of Northern Ireland. This would be a compromise, for it would leave statutes of the United Kingdom legislature immune from judicial control. Combined with a Canadian-style Bill of Rights for the whole country, it would bring the courts more modestly into the political arena. It would also act as a possible stepping-stone to a full-scale assumption of judicial review at a later stage. Those who doubt whether the House of Lords and Court of Appeal could overnight take on the mantle of the Supreme Court of the United States or the High Court of Australia⁹⁰ might be content with a transitional phase of attenuated judicial review. Those who would positively welcome full judicial review might regard it as a realistic approach. Committed federalists might interpret a transitional phase as necessary to overcome deep-seated objections to the fragmentation of legislative power within the United Kingdom.

An Australian writer has said that the essence of a federal system "is that people in a particular locality feel that they have interests in common with those around them in a wider territorial unit, but also interests of their own which demand special safeguards."⁹¹ In Dicey's words, they "must desire union, but must not desire unity."⁹² The advocates of federal government in this country feel that our unitary structure has failed to accord sufficient independence of choice to the regions, especially the outlying regions. Greater centralisation in government, they argue, has led to greater remoteness in government. They recognise the defects of federal government but feel that the advantages outweigh the disadvantages. The words of

⁹⁰ See Hughes, "Judicial Review in the United States," Chap. 10 in *Welsh Studies in Public Law* (1970), p. 172.

⁹¹ J. D. B. Miller, *Australian Government and Politics* (3rd ed., 1964), p. 138.

⁹² *Law of the Constitution* (8th ed., 1915), p. 137.

Justice Frankfurter in *Youngstown Sheet and Tube Company v. Sawyer*⁹³ perhaps sum up as eloquently as any the views of those who would like to see national governments limited constitutionally:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.⁹⁴

The case with which he was concerned was one involving the separation of powers at the centre. Federal government, to which his words might equally apply, is in one sense merely an extension of the separation of powers—a geographical rather than a functional application of the doctrine.

It is unlikely that federal government will be adopted in the United Kingdom in the near future. The immediate solution will probably be greater devolution in the shape of regional bodies superimposed upon a revised structure of local government. The stimulus for eventual adoption of federal government, if it is ever to come about, would probably come from efforts to settle the Irish problem. Be that as it may, the British people will over the next two or three decades become more and more familiar with some of the problems of federalism by virtue of an accelerated process of decentralisation. Moreover there will be external influences of immense importance if this country does enter the European Economic Community from 1973.

During this century proposals for a federal solution have perhaps been as common in relation to a wider unit with this country as a component part as in relation to the internal structure of the United Kingdom. Dicey clearly looked upon federalists as mounting a two-pronged attack on the constitution. He noted nostalgically that "in 1884 hardly a statesman whose name carried weight with Englishmen advocated the formation of a federal system as a remedy for the defects, whatever they were, of the English constitution, or as the means for uniting the widely scattered countries which make up the British Empire."⁹⁵ It later became Home Rule All Round on the one hand, Imperial Federation on the other. The short-lived Imperial

⁹³ 343 U.S. 579 (1952).

⁹⁴ At 613. See Westin, *The Anatomy of a Constitutional Law Case* (1958), p. 147.

⁹⁵ 8th ed., pp. lxxiii-lxiv.

Federation League had in fact been founded in 1884. When Dicey was preparing the eighth edition of his *Law of the Constitution* there were still those who supported "some grand federal constitution"⁹⁶ including the United Kingdom and at least the five Dominions. He lost no time in explaining "that this belief in a new-fangled federalism is at bottom a delusion, and a delusion perilous not only to England but to the whole British Empire."⁹⁷ In the last 50 years the constitutional structure of the Empire and Commonwealth has changed beyond recognition: ideas of imperial federation belong almost exclusively to the decades before the First World War. By 1965 the Commonwealth Prime Ministers agreed that the Commonwealth should be regarded as "an association which enables countries in different regions of the world, consisting of a variety of races and representing a number of interests and points of view, to exchange opinions in a friendly, informal and intimate atmosphere." They added that it was not a formal organisation. "It does not encroach on the sovereignty of individual members. Nor does it require its members to seek to reach collective decisions or to take united action."⁹⁸

It is interesting to note the concern about "the sovereignty of individual members." Whenever independent countries establish some kind of association, there is inevitably some anxiety about the preservation of independence. But there were those in the inter-war years who believed that the interests of world peace demanded that all countries in the world must be prepared deliberately to surrender their sovereignty or independence, possibly in the direction of federal government. "The problem of the modern world," wrote Lord Davies in 1936, "is the problem of federalism and the creation of federal institutions."⁹⁹ In a preface to a book published in 1940 C. E. M. Joad stressed the need to devise some form of international organisation which "will supersede the Nation State just as the Nation State superseded the province, the department, and the canton."¹ There were proposals for federation for the world, for

⁹⁶ *Id.*, p. lxxx.

⁹⁷ *Id.*, p. lxxxi-lxxii. See generally, L. S. Amery, *Thoughts on the Constitution* (2nd ed., 1953), pp. 111 *et seq.*

⁹⁸ Agreed Memorandum on the Commonwealth Secretariat: Commonwealth Prime Ministers' Meeting, 1965, Cmnd. 2713 of 1965, para. 4. See de Smith, *The New Commonwealth and its Constitutions* (1964), Chap. 1.

⁹⁹ *Nearing the Abyss* (1937, popular ed., 1937), p. 98. In *The Seven Pillars of Peace* (1945) he argued "that the existing international system of national sovereign states is sheer anarchy which sooner or later will end in war." See also, Hugh Dalton, *Towards the Peace of Nations* (1928), Chap. xii; Lord Davies, *Facing the Future* (1942).

¹ *Federation and World Order* (1940), by Duncan and Elizabeth Wilson.

the North Atlantic, and for the Commonwealth.² And there were also proposals for a federal Europe.³ In 1940 Ivor Jennings published a suggested constitution for such a scheme.⁴ Immediately after the war there was scepticism or indifference to a federal solution but tentative moves were made towards increased economic co-operation. Eventually the European Economic Community came into being under the Treaty of Rome 1957, while the United Kingdom was instrumental in forming the much looser European Free Trade Association under the Treaty of Stockholm 1959.⁵ The E.E.C. or Common Market was formed in association with the European Coal and Steel Community and the European Atomic Energy Community.⁶ It is significant that the preamble of the Treaty of Rome envisages "the establishment of the foundations of an ever closer union among European peoples, the furtherance of economic and social progress by elimination of the barriers which divide Europe, improvement of the living and working conditions of its peoples, progressive abolition of restrictions on international trade and development of the prosperity of associated overseas countries."⁷ Much of the emphasis is upon economic matters, but the long-term implications are political and constitutional: especially since the Community has its own apparatus of governmental institutions.⁸ Some observers expect the Community to remain a mixed system for some time yet, a *sui generis* system "which cannot be equated with either a federal state or an international organisation in the conventional sense, although it has some of the attributes of each."⁹ Others would like to recognise the logic of the situation and proceed forthwith to a federal Europe, even if this does require "a conscious policy of pooling sovereignty and building up strong and democratic institutions at a European level."¹⁰

² See, e.g., H. N. Brailsford, *Property or Peace* (1934), Chap. 5 (part 6); W. B. Curry, *The Case for Federal Union* (1939); John S. Hoyland, *Federate or Perish* (1944); Clarence K. Streit, *Union Now* (A Proposal for a Federal Union of the Democracies of the North Atlantic) (1939); Jack Cherry, *Once and For All* (1941). See also, *Federal Union: A Symposium* (ed. M. Channing-Pearce) (1940); Lionel Curtis, *The Open Road to Freedom* (1950).

³ See, e.g., Sir Arthur Salter, *The United States of Europe* (ed. W. Arnold-Forster) (1933).

⁴ *A Federation for Western Europe* (1940).

⁵ See J. D. B. Mitchell, *Europe* (The Politics of the Pig in the Middle) (pamphlet, 1970).

⁶ In this Chap. the singular "Community" will be used for the three communities.

⁷ *The United Kingdom and the European Communities*, Cmnd. 4715 (July 1971), para. 13.

⁸ See esp. *Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, Cmnd. 3301 (May 1967), paras. 5-19.

⁹ Miriam Camps, *What Kind of Europe?* (The Community Since de Gaulle's Veto) (1965), p. 126.

¹⁰ John Pinder and Roy Pryce, *Europe after de Gaulle* (Towards a United States of Europe) (1969), p. 53. Mr. Heath used the term "pooling of sovereignty" in H.C., Vol. 796, col. 1223 (25 February 1970). See *New Statesman*, 15 January 1971 at pp. 72 and 73, for two views on a federal Europe (Peter Shore and Michael Barnes).

The "pooling of sovereignty" is one of the phrases frequently resorted to in discussions about the desirability of entry to the Common Market. In the course of the United Kingdom's three efforts to secure entry—in 1961–63, 1967 and 1970–71—there has been considerable discussion about national sovereignty or independence under the Treaty of Rome. There has been an element of confusion because sovereignty is sometimes used to mean "the legal freedom of action of a State *vis-à-vis* other States in the international community" and at other times to mean "the legal power within a State to pass laws."¹¹ Opponents of entry to the E.E.C. are prepared to argue, however, that sovereignty in either sense is threatened. The Treaty of Rome is seen as something quite different from ordinary international agreements: "This is more than a treaty. It is an irreversible commitment. It involves harmonisation of our policy and subordination of our legislation."¹² The practical effect of the Treaty, it is urged, will be that Parliament will have to go along with dictates of the Community as a whole—and this will both infringe national independence and disrupt the basic constitutional principle of parliamentary sovereignty. Sir Derek Walker-Smith, for example, has said that over "a vast range of our economic and social life"—tariffs and trade, taxation and social services, agriculture and social services—our national law would have to be subordinated to the law of the Community. 'No erosion of essential sovereignty forsooth!' There has been no bigger erosion of the power and function of Parliament since Cromwell contemptuously sent the House packing 300 years ago and more."¹³ In a speech at Lyons early in 1971, Mr. Enoch Powell asserted that "it is a fact that the British Parliament and its paramount authority occupies a position in relation to the British nation which no other elective assembly in Europe possesses."¹⁴ The combined efforts of the Council of Ministers, the Commission, the Court of Justice and the Parliament of the European Community are seen as a major threat to the future role and importance of Parliament.

Some of those who support entry into Europe are not prepared to take these arguments about sovereignty as serious constitutional

¹¹ See H.L., Vol. 323, col. 367 (27 July 1971) (Lord Lloyd of Hampstead). See "The Ambiguity of Sovereignty" (T. J. O. Hickey), *The Times*, 29 January 1971, p. 14.

¹² H.C., Vol. 821, col. 1820 (22 July 1971) (Mr. Wedgwood-Benn).

¹³ H.C., Vol. 822, col. 90 (26 July 1971). See also "Threat of a Rubber-Stamp Parliament," *The Times*, 23 July 1971, p. 12 (Sir Derek Walker-Smith); leading article in the *Spectator*, 10 July 1971, pp. 44–45; H.C., Vol. 796, col. 1031 (24 February 1970) (Mr. Douglas Jay).

¹⁴ *The Times*, 13 February 1971, p. 10. See also, H.C., Vol. 796, col. 1265–1266 (25 February 1970) (Mr. Powell).

objections.¹⁵ Lord Hailsham L.C. has described sovereignty as "a non-issue."¹⁶ In his view, "sovereignty is a question of fact, like sex or domicile, and not a question of legal theory. . . The proof of the pudding lies in the eating and not in a study of the terms of legal theory."¹⁷ He has gone on to argue that membership of the European Community would not be "a derogation from sovereignty, but sovereignty plus the advantages of membership, for which is paid the reasonable price of compliance with the rules."¹⁸ As far as parliamentary sovereignty is concerned, two of Lord Hailsham's predecessors have made reassuring statements in the House of Lords. Lord Dilhorne did so in August 1962¹⁹; and in May 1967 Lord Gardiner denied that the legal position of Parliament would be affected even though "membership of the Communities involves a transfer of legislative and judicial powers in certain fields to Community institutions and an acceptance of a corresponding limitation of the exercise of national powers in these fields."²⁰ As far as national independence is concerned, supporters of entry to the E.E.C. take the positive line that British power in the world would increase by virtue of association in the Community. It is argued that sovereignty "is concerned with the reality of power and influence"²¹ and that a decision to stay out of Europe would inevitably lead to a dwindling of national power and independence.²² Mr. Duncan Sandys has claimed that we enjoy "precious little independence" even at the present time, and that, except in marginal spheres, Britain "is no longer big enough, strong enough or rich enough to steer an independent national course. . . ." ²³ The idea that power and influence could be recovered either by a North Atlantic Free Trade Area

¹⁵ See, e.g., H.L., Vol. 323, col. 58 (26 July 1971) (Lord George Brown); Vol. 323, col. 457 (28 July 1971) (Lord Stow Hill), col. 463 (Lord Goodman), col. 472 (Baroness Gaitskell).

¹⁶ H.L., Vol. 323, col. 201 (27 July 1971). In *The Times*, 17 September 1971, p. 4, Lord Hailsham was quoted as stating in a speech that those opposing Britain's entry to the Common Market are "the fuddy duddies, the timorous, the weakminded."

¹⁷ H.L., Vol. 323, col. 202.

¹⁸ *The Times*, 14 July 1971, p. 5 (speech at the Mansion House).

¹⁹ H.L., Vol. 243, col. 416 *et seq.* (2 August 1962). See Thompson and Marsh, "The United Kingdom and the Treaty of Rome: Some Preliminary Observations" (1962) 11 I.C.L.Q. 73, 76-78.

²⁰ H.L., Vol. 282, col. 1202 (8 May 1967). See also, *Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, Cmnd. 3301 (May 1967), paras. 20-22. In H.C., Vol. 822, col. 163 (26 July 1971), Mr. Maudling said: "As regards sovereignty, our activities will be bound by our obligations under the Treaty, and by no more than our obligations under the Treaty, which are basically of an economic and a commercial character."

²¹ H.C., Vol. 821, col. 1709 (22 July 1971) (Sir Alec Douglas-Home).

²² H.C., Vol. 822, col. 51 (26 July 1971) (Mr. Anthony Barber): "We would inevitably be overcome and overshadowed by a larger, stronger and richer Europe. Our political influence would dwindle and history would pass us by."

²³ H.C., Vol. 809, col. 1116 (20 January 1971) (Mr. Duncan Sandys).

or by some link-up within the Commonwealth has been vigorously rejected.²⁴ In *The United Kingdom and the European Communities*, the White Paper published in July 1971, the Government declared:

The practical working of the Community accordingly reflects the reality that sovereign Governments are represented round the table. On a question where a Government considers that vital national interests are involved, it is established that the decision should be unanimous. Like any other treaty, the Treaty of Rome commits its signatories to support agreed aims; but the commitment represents the voluntary undertaking of a sovereign state to observe policies which it has helped to form. There is no question of any erosion of essential national sovereignty; what is proposed is a sharing and an enlargement of individual national sovereignties in the general interest.²⁵

The emphasis in much of the discussion about entry to the E.E.C. has tended to be on economic and commercial considerations.²⁶ But sovereignty has come up more frequently in the last year or two. A rapidly growing literature on the legal, constitutional and political implications of entry has no doubt contributed to this change.²⁷ However, in a Hobart Paper issued in 1962, Professor Meade had already expressed his view that "the political issues are ultimately more important than the economic. . . . The fundamental objective

²⁴ See *The United Kingdom and the European Communities*, Cmnd. 4715 (July 1971), paras. 36-37. See generally, H. C. Allen, *The Anglo-American Predicament* (The British Commonwealth, the United States and European Unity) (1960); George E. G. Catlin, *The Grandeur of England and the Atlantic Community* (1966); Catlin, *The Atlantic Commonwealth* (1969); Douglas Jay, *After the Common Market* (1968).

²⁵ Cmnd. 4715, para. 29.

²⁶ See, e.g., *The United Kingdom and the European Communities* (Labour Party's background document for October 1971 conference on the terms negotiated for entry to the Common Market; published in September 1971). See also, *The Case Against Entry* (published by the *New Statesman*, 1971).

²⁷ See S. R. de la Mahotière, *The Common Market* (A Comprehensive Guide) (1961) and *Towards One Europe* (1970); R. W. G. Mackay, *Towards a United States of Europe* (An Analysis of Britain's Role in European Union) (1961); Walter Hallstein, *United Europe* (Challenge and Opportunity) (1962); Sidney Dell, *Trade Blocs and Common Markets* (1963); Drew Middleton, *The Supreme Choice* (Britain and the European Community) (1963); Nora Beloff, *The General Says No* (1963); H. G. Gelber, *Australia, Britain and the E.E.C.* (1966); Lord Gladwyn, *The European Idea* (1966); Edward Beddington-Behrens, *Is There Any Choice?* (Britain Must Join Europe) (1966); René Albrecht-Carrié, *The Unity of Europe* (An Historical Survey) (1966); P.E.P., *European Unity: Co-operation and Integration* (A Survey of European Organisations) (1968); Edward Wall, *Europe: Unification and Law* (1969); Robert J. Lieber, *British Politics and European Unity* (1970); Douglas Evans (ed.), *Destiny or Delusion: Britain and the Common Market* (1971); *Britain, the Commonwealth and Europe* (Round Table Essays, 1971 (October)); Enoch Powell, *The Common Market* (The Case Against) (1971). In the latter book, Mr. Powell writes (at p. 119): "Opinion has been right to fasten upon sovereignty as the central issue. Either British entry is a declaration of intent to surrender this country's sovereignty, stage by stage, in all that matters to a nation, and makes a nation, or else it is an empty gesture, disgraceful in its hollowness alike to those who proffer and to those who accept it." See also his views reported in *The Times*, 18 September 1971, p. 2.

of the architects of the E.E.C. is quite frankly the political unification of Western Europe into a federation or confederation of states.”²⁸ Even those who refuse to recognise serious political dangers in British entry to the Community are nonetheless prepared in many instances to accept the long-term possibilities of federalism in Europe.²⁹ What they deny is that entry involves any automatic commitment to some supra-national structure of government.³⁰ “The foundation of the Community,” said Lord Hailsham, “lies in contract and not coercion, although by contract the parties use their powers so as to produce some of the results achieved formerly only by federation.”³¹ This seems to presuppose a difficult transitional phase in the Community when the constitutional structure will be closer to a confederation than to a federation.³² If it works, however, and if the member countries become—in economic and commercial terms—inextricably linked over, say, twenty years or more, the confederation may solidify into a federation—though this, as Lord Lloyd of Hampstead has reminded us, is a problem for another generation.³³ Such a development would be in accord with Mr. Wilson’s comment “that the whole history of human progress is a history of gradual abandonment of national sovereignty.”³⁴

Perhaps the crucial factor in any constitutional movement towards federal government in the Community will be the role of the European Court of Justice, which “is concerned essentially with the observance of the Treaty and the correct implementation of all Community legislation.”³⁵ The well-known *Costa* case in 1964 has encouraged

²⁸ James E. Meade, *U.K., Commonwealth and Common Market* (1962) (pamphlet), p. 9. See also William Pickles in the *Sunday Express*, 13 November 1961, p. 8; H.C., Vol. 809, col. 1163 (20 January 1971) (Mr. St. John-Stevás); H.C., Vol. 821, col. 1857 (23 July 1971) (Mr. James Prior).

²⁹ See Lord Gladwyn in H.L., Vol. 323, col. 41 (26 July 1971), and Vol. 316, col. 340 (10 March 1971).

³⁰ H.C., Vol. 728, cols. 1555–1556 (19 May 1966) (Mr. Wilson); H.C., Vol. 786, col. 1159 (8 July 1969) (Mr. Wilson); *The Times*, 30 July 1969, p. 1 (report of speech by Mr. Wilson).

³¹ H.L., Vol. 323, col. 205 (27 July 1971).

³² See *The Observer*, 11 July 1971, p. 8 (leading article): “The greatest task of European statesmanship may be to try to avert the fatal flaws of a loosely-knit confederation during the long transitional period when an effective federal State will not yet be a possibility.”

³³ See H.L., Vol. 323, col. 370 (27 July 1970). See de la Mahotière, *op. cit.*, pp. 280 *et seq.*

³⁴ H.C., Vol. 796, col. 1326 (25 February 1970). A variety of views on sovereignty and other issues were expressed during the six-day debate on the Common Market in November 1971—see H.C., Vol. 823, cols. 911 *et seq.*, 1093 *et seq.*, 1234 *et seq.*, 1480 *et seq.*, 1732 *et seq.*, 2076 *et seq.* See also the debate of October 1971 in H.L., Vol. 324, cols. 529 *et seq.*, 664 *et seq.*, 817 *et seq.*

³⁵ P.E.P., *European Unity* (Co-operation and Integration) (1968), p. 189. See generally Thomas J. Schoenbaum, “The Growth of Judicial Power in the European Economic Community” (1969) 48 N. Carolina L.R. 32, 48: “To assure the effectiveness and the implementation of either a federal or a supra-national legal order, some type of check must be maintained over the legislative

the view that the Court of Justice has already acted upon the Treaty of Rome as effectively a constitution operating within member countries as well as in relation to the Community as a whole.³⁶ But it would surely be premature to interpret the Court's ruling in that and in other cases as a full-scale assertion of judicial review. In the next few years much will depend upon political and economic factors. Indeed, if the United Kingdom does enter the Community, then the peculiarly British doctrine of parliamentary sovereignty might initially inhibit the Court of Justice in its constitutional pronouncements. Only when the political and economic structure of the Community becomes reasonably settled will British judges and lawyers feel confident in seeking to establish the supremacy of the Treaty of Rome. And only then will federal government in Europe be formally recognised.

In the meantime it is constitutional instinct rather than constitutional fact that will prevail in the debates about entry to the European Community.³⁷ In the eyes of Lord Hailsham, for instance, the "ultimate sovereignty of Parliament"³⁸ is not threatened and entry to the E.E.C. does not constitute an inexorable step towards federation; and he would doubtless join Lord George-Brown in rejecting "the exaggerated and shrill prognostications of doom and gloom."³⁹ Others are prepared to accept some diminution in parliamentary power either immediately or in the near future,⁴⁰ and they do so with equanimity because in many cases they welcome the prospect of a supranational organisation. But there are also many opponents of entry to Europe who see acceptance of the Treaty of

and administrative acts of both the federal or supranational entity and its member states. In the E.E.C., as well as in the United States, much of the responsibility for such control has been delegated to or assumed by the judiciary."

³⁶ For discussions of *Costa v. E.N.E.L.* [1964] C.M.L.R. 425, see Schoenbaum's article *supra* and Eric Stein, "Toward Supremacy of Treaty-Constitution by Judicial Fiat: on the Margin of the *Costa* Case" (1965) 63 Michigan L.R. 491, esp. at p. 513.

³⁷ See generally S. A. de Smith, "The Constitution and the Common Market: A Tentative Appraisal" (1971) 34 M.L.R. 597; Otto Kahn-Freund, "Legal Consequences of Common Market," *The Times*, 21 May 1962, p. 11; Alan Campbell, "How the Common Market will affect British Law," *The Times*, 16 May 1967, p. 11; J. D. B. Mitchell, "What do you want to be inscrutable for, Marcia?" (or the White Paper on the *Legal and Constitutional Implications of United Kingdom Membership of the European Communities*) (1967) 5 C.M.L.R. 112; Andrew Martin, "The Accession of the United Kingdom to the European Communities: Jurisdictional Problems" (1968) 6 C.M.L.R. 7; N. M. Hunnings, "Constitutional Implications of Joining the Common Market" (1968) 6 C.M.L.R. 50; G. Bebr, "Law of the European Communities and Municipal Law" (1971) 34 M.L.R. 481.

³⁸ H.L., Vol. 323, col. 203 (27 July 1971).

³⁹ H.L., Vol. 323, col. 58 (26 July 1971).

⁴⁰ See, e.g., Michael Niblock, *The E.E.C.: National Parliaments in Community Decision-Making* (1971); Ivor Richard and others, *Europe or the Open Sea?* (1971); Norman S. Marsh, "The Common Market and the Common Law," *Listener*, 15 March 1962, pp. 455-457.

Rome as a major constitutional change in itself and one that ought to be resisted unless approved by the people. Mr. Raymond Blackburn went to the courts in 1971 to seek declarations that the British Government will, by signing the Treaty of Rome, irreversibly surrender in part the sovereignty of Parliament; that the Treaty should not prevail over the rule of law "that the sovereignty of the Crown in Parliament cannot be fettered"; and that the vital provisions of the Treaty cannot validly be accepted unless a new constitution is adopted with the consent of the British people. The Attorney-General applied to the courts to have the statements of claim struck out on the ground that they disclosed no reasonable cause of action, and the case eventually came to the Court of Appeal on that issue.

In *Blackburn v. Att.-Gen.*⁴¹ the Court of Appeal agreed with the decisions below that the statements of claim should be struck out. The treaty-making power is a prerogative power and one which ought not, it was stressed, to be challenged or questioned in the courts. It was also emphasised that it is no part of the court's function or duty "to make declarations in general terms regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are purely hypothetical."⁴² But Lord Denning M.R. did appear to agree with Mr. Blackburn's assertion that entry to the Common Market would be an irreversible step, and he felt that legal theory must give way to practical politics:

What are the realities here? If Her Majesty's Ministers sign this treaty and Parliament enacts provisions to implement it, I do not envisage that Parliament would afterwards go back on it and try to withdraw from it. But, if Parliament should do so, then I say we will consider that event when it happens. We will then say whether Parliament can lawfully do it or not.⁴³

The Master of the Rolls must surely be right in keeping options open for the courts. He quoted Professor Wade's statement that "sovereignty is a political fact for which no purely legal authority can be constituted," and it will be recalled that Professor Wade added that it is a political fact which can only be changed by revolution.⁴⁴ At this point in time, with immense changes possible both within the United Kingdom and in respect of the United Kingdom's associa-

⁴¹ [1971] 1 W.L.R. 1037 (see arguments in *The Times* law report for 15 March 1971).

⁴² [1971] 1 W.L.R. at p. 1041.

⁴³ *Id.* at p. 1040. In the course of his judgment, Lord Denning referred to the *Costa* case.

⁴⁴ H. W. R. Wade, "The Basis of Legal Sovereignty" [1955] C.L.J. 172, 189. See, for recent and important discussions of parliamentary sovereignty: S. A. de Smith, *Constitutional and Administrative Law* (1971), Chap. 3; G. Marshall, *Constitutional Theory* (1971), Chap. 3. See also C. F. Amerasinghe, "The Legal Sovereignty of the Ceylon Parliament" [1966] *Public Law* 65; J. W. Bridge, "The Legal Competence of the New Zealand Parliament" [1969] *Public Law* 112.

tion with other countries, it is possible that we are on the threshold of such a revolution. The basic assumptions of our constitutional law could be radically altered within a decade. It is impossible to predict the precise nature and sequence of the constitutional changes which lie ahead. But the problems of a supreme constitution, of judicial review and of federal government are more than likely to emerge. The Constitution of the United Kingdom is at the greatest turning-point since the seventeenth century.

LAW AT THE END OF ITS TETHER

R. W. M. DIAS

THE past fifty years have seen turbulences in every state, even the most secure hitherto. In a country like Britain, which has remained comparatively stable, it has been easy to preserve the philosophy of analytical positivism in which the science of law is abstracted from social, moral and other value-considerations.¹ Such aloofness is stable only so long as value-conflicts do not assume large enough proportions to disturb the settled state of affairs, so that one can play being a jurist as a purely intellectual pastime without overmuch concern as to the direction of social development, since one is comfortably assured of a fairly uniform flow of public opinion. But when crises begin to convulse the very surface of national life, jurists, and alone judges, are compelled to make conscious decisions as to which way to steer if shipwreck is to be avoided; and the decision to remain positivist then becomes a choice of one of several attitudes, the merits of which invite comparison and question. In keeping with the general surge of unrest, the past fifty years have seen in Britain somewhat of a swing away from positivism and a growing preoccupation with values.

Law serves society, so speculation about it may profitably be related to social needs. One great cry today is for "Freedom," formulated as it has been by traumatic experiences of totalitarian dictatorships, which have induced almost hysterical suspicions of any threat to law and order. The problems thrown up by it are momentous, and to meet this challenge jurists need to marshal all the insights that have been gleaned from both past and contemporary ways of thinking. Analytical distinctions should not be ignored simply because they happen to be fruits of positivist philosophy. Indeed, a useful discussion of "freedom" can proceed without first separat-

The true "father of British jurisprudence" is Jeremy Bentham: *Introduction to the Principles of Morals and Legislation* (ed. J. H. Burns and H. L. A. Hart, 1970), continued in *Of Laws in General* (ed. H. L. A. Hart, 1970), on which see Hart, "Bentham's 'Of Laws in General'" (1971) 2 *Rechtstheorie*, 55. The latter work was first published in 1945 by C. W. Everett under the title *The Limits of Jurisprudence Defined*. John Austin continued the tradition of analytical positivism by his *Jurisprudence* (5th ed. R. Campbell, 1885). Two modern analytical positivists are Hans Kelsen (e.g., *General Theory of Law and State*, transl. A. Wedberg, 1949, and *Pure Theory of Law*, transl. M. Knight, 1967) and H. L. A. Hart (e.g., *The Concept of Law*, 1961).

ing its various meanings.² It may mean (1) "freedom from" another's power, or "immunity." Thus, a freeman, as opposed to a slave, is one who is free from the dominion of someone else. It may mean (2) "freedom to" act as one chooses, or "liberty," the essence of which is absence of compulsion.³ Free speech, for example, implies that one is free to speak or write as one pleases and that there is no prohibition against doing so. It may also mean (3) "freedom from disability," or "capacity," *i.e.*, acquisition of powers by oneself. This is a less common use of the term "freedom" and aspects of it are distributable under (1) and (2).

Immunity and liberty are distinct, but linked all the same. Liberty to act implies the absence of a duty not to act, and *vice versa*; and behind the idea of "legal duty" stands all the paraphernalia of power, summed up by the word "authority." Complete liberty of action cannot exist without complete absence of duty, which implies complete immunity from the power of others; which is why followers of the "alternative society" today, whilst clamouring for liberty of action, protest against being oppressed, as they feel, by the constraints imposed by the power of established social institutions.

Although the ideas are connected, they remain distinct. Much harm results from the loose use of "freedom" whereby agitation for "freedom from" power slides into "freedom to" act as one pleases.⁴ The danger lies in the fact that liberty to act can so easily end in a return to power, which could come about in one of two ways. Those who are loudest in asserting their own liberty of action often pay little heed to their opponents' equal liberty. They are foremost in preventing others from maintaining a different or opposite point of view, and fear of opposition makes them deny to anyone else the chance to exploit the same sort of opportunities for action and expression by which they themselves hope to succeed, or have succeeded. So it comes about that the very anxiety to preserve one's own liberty of action, whenever this is threatened by equal liberty in others, leads to the use of repressive power in order to keep the

² The analysis is based on W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed. W. W. Cook, 1923) Chap. 1.

³ *Digest*, 50.17.55; Thomas Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England* (ed. J. Cropsey, 1971) s.v. "Of Sovereign Power," p. 73. For detailed analysis, see G. L. Williams, "The Concept of Legal Liberty" (1956) 56 Col.L.R. 1129, reprinted in *Essays in Legal Philosophy* (ed. R. S. Summers, 1968), p. 121. See also C. E. Shattuck, "The True Meaning of the Term 'Liberty' in those clauses of the Federal and State Constitutions which protect 'Life, Liberty and Property'" (1890-91) 4 Harv.L.R. 365. For the distinction between "freedom from" and "freedom to," see L. L. Fuller, "Freedom—a Suggested Analysis" (1954-55) 68 Harv.L.R. 1305; Isaiah Berlin, *Two Concepts of Liberty* (1958, pamphlet).

⁴ See Iris Murdoch, "The Sovereignty of Good over Other Concepts," *Leslie Stephen Lecture* (1967) at pp. 31-32.

latter in check⁵; which is why champions of "freedom" so often establish worse dictatorships than those against which they rebel.⁶ On the other hand, unlimited liberty of action for everybody can only result in chaos. Traffic, for instance, would seize up if there were no rules of the road. So also with society; if there are no rules regulating behaviour the time will come when, out of a need for security, progress and peace, people will unite in supporting a return to power to curb anarchy⁷; which is why so many law-abiding and "decent" folk have been among the first to back what later developed into ruthless dictatorships.⁸

The question whether there should be society or anarchy is not one to be settled by law. If the choice is for anarchy, then, as far as jurists are concerned, there is an end to the matter. If the choice is for society, of whatever sort, there has to be some limitation of both power and liberty. Each society must work out for itself, and keep on working out, the balance it wants between power, immunity and liberty. Some countries, e.g., African and Middle Eastern countries, seem to need power-structures, while others do not. It also happens that when a country is possessed of an overriding national cause, as one in the throes of war or imbued with nationalist or crusading zeal, people are willing to endure much arbitrary power and curtailment of liberty. The urge to assert liberty only becomes a major concern when there is no such overriding obsession.⁹

Throughout the ages theories of law have reflected the trend of the day, now supporting a need for power, now for immunity and liberty. Unfortunately, power has ended in abuse and so provoked revolution for immunity and liberty, and liberty has likewise ended in abuse and so provoked a return to power. Oppression by the Pharaohs led to the exodus of the Israelites and their desire for a society in which people were immune from human rulership¹⁰; the

⁵ e.g., the régimes in African states, old and new.

⁶ In Marxist philosophy, the use of limitless power by the proletarian dictatorship, after winning freedom from "capitalist oppression," is justified as being necessary, *inter alia*, to forestall counterrevolution. This has led to the Yugoslav accusation that the Soviet régime is itself a counterrevolutionary dictatorship. Cf., M. Djilas, *The New Class* (1957).

⁷ Cf., Thomas Hobbes's account of the origin of society: *Leviathan* (1651).

⁸ e.g., the manner in which Hitler pulled Germany together from the disintegration of the Weimar Republic.

⁹ Cf., a "closed society" in which the individual counts for nothing, and an "open society," in which he is given scope: D. Lloyd, *The Idea of Law* (1964) Chap. 7. The Soviet Union kept up a highly repressive system by sustaining a sense of crisis and a need for self-preservation in the face of "capitalist encirclement." When this play played itself out, it was possible to fall back on the crusading mission of communism as an alternative. It is still not clear whether "full communism" has yet been achieved in Russia.

¹⁰ The rulership was of God alone, the Theocracy, but even this rested on voluntary acceptance in the Covenant: *Gen.* 15-18; 26.3-5; 28.12-16; 35.9-12; *Deut.* 26.16-18. The Theocracy lasted until Saul was appointed King in 1037 B.C.

chronic instability of the Greek city-states inspired the preachings of Plato and Aristotle which, on the whole, were directed towards supporting power-structures in order to preserve the *status quo*; reaction against the monolith of the Holy Roman Empire, loosely knit as it was, resulted in independent national sovereigns asserting their immunity from external control and unrestricted liberty of action *inter se*.¹¹ The abuse of this liberty ended in such barbarous anarchy—witness the Thirty Years War—that the idea of an international power-structure of law and order began to be pressed in an attempt to impose some limits.¹² On the other hand, the abuse of internal power, which sovereigns had gained over their own subjects¹³ led to revolutions, *e.g.*, in England in 1688 to limit monarchical power,¹⁴ in America to throw off monarchy and in France to destroy monarchy altogether.¹⁵ The abuse of liberty which followed in France called for the return of even sterner power with Napoleon. More recently, the libertarian Weimar Republic in Germany after the First World War, and especially its failure to deal firmly with social unrest, led to one of the most ruthless power-structures the world has yet known. Fear of the freedom of the African populace has led to the power-structures in southern Africa. A tragic cycle is discernible in all this, and to break out it is not enough simply to utter truisms about curbing the abuse of power and liberty, but to find ways of making them effective. The abuse of these *must* somehow be checked, else society is doomed.¹⁶ Another equally important “must” is adaptability to change, since failure to change is a fruitful seed of mistrust. These factors lie at the root of the confidence which people have in their society and which makes them appeal to its laws as standards of evaluating behaviour¹⁷; they are conditions *sine quibus non* of peaceful evolution.

What exactly does “must” mean in the statement that these conditions must be fulfilled if society is to continue? It does not mean that something is desirable, *e.g.*, “you must see that film”; but refers to a condition *sine qua non* of achieving some result. Perhaps a further distinction might be drawn between what “should” or “ought” to be done as referring to any one of a number of

¹¹ Niccolò Machiavelli, *The Prince* (1513).

¹² Cf., Hugo Grotius's *cri de coeur* in *De Jure Belli ac Pacis, Prolegomena*, 28 (1625).

¹³ Justified by Hobbes, *Leviathan*.

¹⁴ Justified by John Locke, *On Government* (1690).

¹⁵ Justified by Jean Jacques Rousseau, *Du Contrat Social* (1762).

¹⁶ Lord MacDermott, *Protection from Power under English Law* (1957), p. 195; cf., Aristotle, *Politics*.

¹⁷ Cf., H. L. A. Hart's “internal aspect of rules”: *The Concept of Law*, pp. 55–56, 86–88. For criticism of his treatment of the distinction between “legally obliged” (a rule is valid) and “legal obligation” to obey, see R. E. Hill, “Legal Validity and Legal Obligation” (1970) 80 Yale L.J. 47.

means to an end, e.g., "if you want to get warm, you should light the fire/should put on an overcoat/should take exercise"; and what "must" be done as referring to the only means to an end, e.g., "to make a will you must have two witnesses."¹⁸ Checks on power and liberty and adaptability to change are "musts" in this latter sense.

All this, however, is distinct from another question: how can the "must" be achieved in practical terms? It may be difficult, or even impossible, in the circumstances, but that does not invalidate the "must." The proposition "to keep alive a man must have food and water" holds good even in the case of a lone explorer lying exhausted in a waterless desert. This paper will consider how far it is possible to provide checks on the abuse of power and liberty and glance at adaptability. In whatever manner these may be achieved, if at all, every nook and cranny of the system should be within reach of their influence.

The insistence of positivists on a total separation between a concept of law (or legal system) and values is a confession that they are unable to help.¹⁹ It is not enough to say: "this is law," and as a separate proposition: "but it is a wrong use of law." Some wrong uses are ultimately so destructive of society and of law itself that a way has to be found of ensuring that it is not a "use of law" to do such things. A positivist concept, which rigidly separates law and values, may be likened to a chart depicting simply the formal structure of a machine. But no depiction of a machine is of value unless it is intended to be thought of as a working machine, and the structure of every such machine has been worked out so as to make *controlled* use of motive power. All structural presentations, therefore, proceed on the *assumption* that such control will be forthcoming. The analogy, however, is not exact. Legal machinery is but partly the product of human calculation; it is also very much the product of social forces over which human control is limited, since human beings, as members of society, are themselves in the grip of those forces. There is thus all the more reason for incorporating controls and safeguards into one's concept. The positivist attitude is escapist and short-sighted: escapist in that it casts this vital problem away from the lawyer, short-sighted in that it ignores the need to try at least to build governors on the forces that can shatter the legal system and society. It is true that for most practical purposes at this or that given moment, a distinction can be drawn between

¹⁸ W. W. Buckland, *Some Reflections on Jurisprudence* (1949), p. 91.

¹⁹ H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1957-58) 71 Harv.L.R. 593. For a distinction between the "concept" and the "idea" of law, see B. E. King, "The Concept, the Idea and the Morality of Law" (1966) 24 Camb.L.J. 106.

formal structure and values.²⁰ If one thinks in terms of continuity instead, of an ongoing *system* in other words, account has to be taken of those factors without which continuity would not be possible. Throughout history, legal theory has been invoked now in support of power, now in support of immunity and liberty. The fatalistic tragedies are attributable, not to such support, but to the failure to control whichever force was being supported.

Control of Power

Confidence in the exercise of power by anyone depends on his entitlement to wield it. In former days people were content to believe in and to accept divinely-inspired lawgivers, semi-divine kings, aristocracies and the like. Nowadays when belief is less naive and when one class is not supposed to be superior to another, no one is entitled to wield power by birthright; so recourse is had to devices like representative government. But such devices presuppose suspicion of power, which is why control is felt to be necessary.

Before going further, two preliminary matters might be mentioned in this connection. One is that no exercise of power should be beyond the scrutiny of law, which means the courts.²¹ The other is that power-wielders should not become a closed circle. Eligibility to participate in the exercise of power and the degree of participation will have to be worked out in detail.²²

The exercise of power is associated with the achievement of justice, or at least with the avoidance of a sense of injustice. In Aristotelian terms,²³ justice may be "distributive," which has to do with the allocation of advantages and disadvantages, equally among equals and unequally among unequals,²⁴ and is a task assigned mainly

²⁰ J. Raz, *The Concept of a Legal System* (1970) gives only a formal analysis, and it is noteworthy that at various points he talks specifically of "momentary" systems, especially at p. 187.

²¹ The problem of protecting the individual worker against his union becomes insoluble if unions have their way in operating outside a legal framework and the courts. To say that the worker needs no protection other than that provided by his union is no answer to the problem of protecting him *against* the power of his union. The argument that unions exist to protect workers, not to abuse them, might be countered by reference to cases like *Bonsor v. Musicians' Union* [1956] A.C. 104, *Rookes v. Barnard* [1964] A.C. 1129, and many others.

²² In particular, the age, experience and interests of participants need to be balanced; cf., the age-old wisdom of *Ecclesiastes*, 10.5, 16.

²³ *Nicomachean Ethics*, V. Cf., E. N. Cahn, *The Sense of Injustice* (1949), who regards justice as what is needed to remedy that which arouses a sense of injustice. He discusses this with reference to power, freedom, order, security and change.

²⁴ It is unnecessary to enter into the crucial point how "equality" is to be determined; see C. J. Friedrich, "Justice: the Just Political Act," 6 *Nomos, Justice*, p. 34. For modern analyses, see Ch. Perelman, *The Idea of Justice and the Problem of Argument* (transl. J. Petric, 1963); A. M. Honoré, "Social Justice" in *Essays in Legal Philosophy*, p. 61.

to the legislature; or it may be "corrective," which has to do with redressing the inequality resulting from activities and is a task assigned mainly to the judiciary.

Should control of legislative power be applied through "duty" or "disability"? It is not easy to subject supreme legislatures to duties, but there is no reason why they may not be subject to disabilities (incapacities).²⁵ In order to discover the best way of achieving this result it is necessary to stress that a legal system is more than the sum-total of its laws, just as a railway system is not simply a collection of all the tracks and rolling stock. The "system" depends on the pattern of inter-relation between the institutional structure (distribution of authority) and substantive laws, both with regard to each other and *inter se*.²⁶ The feature which characterises all these as "legal" is validity, and control of power needs to be built into this concept in such a way that an enactment, which is an abuse of power, is invalid, *i.e.*, not "law": *lex esse non videbitur quae iusta non fuerit*.²⁷

The positivist-naturalist debate ultimately resolves itself into a dispute about validity. The former are right in saying that the identification of any proposition as "law" at any given moment (its validity) rests on formal criteria (incorporation in, *e.g.*, statute or precedent). Whether the proposition itself constitutes an abuse, is just or unjust, does not, in their view, affect its quality as a "law"—in short, it is describable as a "just law" or an "unjust law" as the case may be, but a "law" nonetheless. The danger of this attitude is that it nurtures the very forces that can destroy society. For, so long as power-wielders adhere to formal requirements (*e.g.*, necessary majority, procedure), they can climb from one excess to another in the content of their laws. "Due process" then becomes a cloak for the grossest abuses, as in Nazi Germany; and degrading directives can be administered with scrupulous impartiality, as in South Africa.²⁸ Naturalists are also right in saying that a quality of just content is a condition that needs to be met if a law is to last. While conceding that an unjust precept may be "law" at this moment of time, they would argue that it is not destined to live, for its unjust quality will kill it sooner or later. To this extent there is no conflict. The problem is how to build in a condition of minimum justness as part

²⁵ This is the fallacy behind Austin's claim for illimitability for the sovereign: see J. Raz, *op. cit.*, p. 28.

²⁶ J. Raz, *op. cit.*, Chap. 4. For H. L. A. Hart's clue to a "legal system," see *The Concept of Law*, Chap. 5.

²⁷ St. Augustine, *De Libero Arbitrio*, 1.5.7.

²⁸ F. Pollock, *Essays in Jurisprudence and Ethics*, p. 50. For a discussion of the influence of positivism on South African judges, see J. Dugard, "The Judicial Process, Positivism and Civil Liberty" (1971) 88 S.A.L.J. 181.

of the criterion of validity, *i.e.*, of identification here and now²⁰; and this affects the concept of both "a law" and "legal system."²⁰

In every system validity is based on the acceptance³¹ of some medium as capable of imparting "law-quality" to all institutions and propositions established by or emanating from it.³² The problem is how to disable this medium, which almost invariably is the supreme legislature, from producing unjust laws. Some possibilities may now be considered, but in doing so the previously mentioned distinction has to be borne in mind between the imperative need to attach such a disability and the practicalities of achieving it.

Historical basis. In Britain, the revolution of 1688 was essentially a protest against the abuse of legislative power by the monarch; the revolt of the American colonies was a protest against the abuse of legislative power by the British government. In both cases new power-structures were accepted because they were thought to provide guarantees against certain abuses. Accordingly, it is arguable that these guarantees become built-in limitations on the power of the new structures.³³ The principal difficulty here is that a historical limitation

²⁰ On the need for moral quality in laws, see Lord MacDermott, *op. cit.*, p. 8 and *passim*.

³⁰ In addition to protection from unjust laws, the individual needs protection from other by-products of power-structures, *e.g.*, bureaucracy and computers. These are not dealt with here. On bureaucracy, see J. N. Hazard, "Socialism, Abuse of Power and Soviet Law" (1950) 50 Col.L.R. 448. On computers, see A. R. Miller, "Personal Privacy in the Computer Age: the Challenge of a New Technology in an Information Oriented Society" (1969) 67 Mich.L.R. 1091. For protection from the power of wealth, status, monopoly and restrictive associations, see Lord MacDermott, *op. cit.*, Chaps. 5-6.

³¹ The relevant acceptance today is that of persons charged with administering that which they identify as "laws," *viz.*, judges and officials. Initially acceptance rests on a measure of popular support. This temporal distinction is not brought out either by Austin (*op. cit.*, p. 221) or Kelsen (*General Theory*, p. 119; *Pure Theory*, pp. 211 *et seq.*).

³² Cf. Kelsen's *Grundnorm* (works cited in last note). In most countries validity is imparted by a constitution, but in Britain the validating media are statute, precedent and immemorial custom. With regard to precedent, it is tempting to conjecture whether the retrospective effect of overruling stems from the idea that a wrong decision can never have been "law" rather than from the Blackstonian thesis that judges do not make "law," which may only be rationalisation, *ex post facto*.

³³ Cf., Sir Matthew Hale's answer to Hobbes: "Sir Matthew Hale on Hobbes; an unpublished manuscript," published by F. Pollock and W. S. Holdsworth in (1921) 37 L.Q.R. 274; on which see in more detail D. E. C. Yale, "Hobbes and Hale on Law, Legislation and Sovereign," *ante*, p. 121. For a bold judicial application of a historical limitation, see the judgment of Mushtaq Hussain J. in *Hassan and Rasul v. The State* (published by F. Bedar and S. Rahman in *Justice*, Lahore, 1969), especially at p. 25: "Martial law was imposed, therefore, with the declared purpose of 'restoring sanity,' 'restoring and saving the country from internal disorder and chaos' and to 'ensure that the administration resumes its normal functions to the satisfaction of the people' . . . No one, including the Chief Martial Law Administrator, can transcend or deviate from the sole purpose of restoring law and order and democracy, and it needs no gainsaying that curbing the jurisdiction of the established judiciary is not a step in that direction." Also, Bentham, *Of Laws in General*, pp. 64 *et seq.*

may not go far enough. Thus, the revolution of 1688 only provided a guarantee against the abuse of power by the prerogative by transferring power to "constitutional government"; this is no safeguard against abuse of power by such government. The compact between the four provinces of South Africa, which resulted in the South Africa Act, 1909, was designed to protect minority rights.³⁴ Does it forbid *apartheid*? Another difficulty is that the historical context may in fact enshrine an abuse of power. Thus, the Rhodesian revolution of 1965 occurred because the minority white population presently wished to deny to the African majority a share in government.³⁵ The historical context here might furnish justification for perpetual denial. Such a context might also perpetuate outdated ideas.

In any case, the acceptance of a historical limitation, and the interpretation of its scope, depend on the judges of the day, and they can ultimately be forced to decide as government wants.

Constitutional basis. Montesquieu preached that according to the experience of the ages power tends to be abused, and that all would be lost unless power is made to check power. His solution was a separation of the legislative, executive and judicial functions, guaranteed in a constitution,³⁶ the outstanding example of which is of course the Constitution of the United States of America.³⁷ Such a method of controlling power is effective up to a point, but the measure of control depends on the content of the limitations, whether these are spelled out in detail or stated in broad terms; on whether the safeguards are cancelled by countervailing provisions³⁸; on the

³⁴ E. McWhinney, *Judicial Review in the English-speaking World* (2nd ed. 1960), Chap. 6.

³⁵ The abuse of power lies in the indefinite perpetuation of racial inequality for the benefit of the white power-wielders, who also control African development towards equality: see my paper, "Legal Politics; Norms behind the *Grundnorm*" (1968) 26 Camb.L.J. at p. 257, and *Jurisprudence* (3rd ed. 1970), p. 106. My further point that the Rhodesian judiciary, who swear to "do right to all manner of persons," could justifiably have refused to accept a Constitution, which pledges them to continue doing injustice, is not quite answered by R. H. Christie, "Practical Jurisprudence in Rhodesia" (1968) 1 Compar. & Int.L.J. of S.A. 390, (1969) 2 *id.*, p. 3, 206, and J. W. Harris, "When and Why does the *Grundnorm* Change?" (1971) 29 Camb.L.J. 103, both of whom say, in effect, that the judges were justified in accepting the Constitution ultimately inasmuch as the régime was effective, i.e., might had become right. See S. A. de Smith, *Constitutional and Administrative Law* (1971), pp. 70-71.

³⁶ *L'Esprit des Lois* (1748), 11.4-6. It is commonly thought that he based his views on a misunderstanding of the British system. For the view that he was really arguing what ought to obtain in France, and that he was using Britain as a facade for avoiding domestic censorship, see H. J. Merry, *Montesquieu's System of Natural Government* (1970).

³⁷ A Commonwealth example of the doctrine of separation of powers being used is *Liyanage v. R.* [1967] 1 A.C. 259.

³⁸ V. G. Hiemstra, "Constitutions of Liberty" (1971) 88 S.A.L.J. 45 (comparing the American and German constitutions).

case with which the constitution can be circumvented or changed³⁹; and ultimately on judicial interpretation.⁴⁰ A contrapuntal effect is that a constitution may enshrine a value, such as liberty, without providing safeguards against its abuse, as in the case of the First Amendment to the United States Constitution. America has since found, at times to her bitter cost, that this can effectively inhibit the use of power to curb even the grossest abuse of liberty, since any such attempt is liable to be struck down as being unconstitutional.⁴¹

Supra-national basis. The Treaty of Rome, which created the European Economic Community, points towards another, rather distant, possibility. In the opinion of the European Court, Community Law has overriding effect within the legal systems of member-states and rights are conferred directly on individuals.⁴² Could not something on the same lines be established, such as, *e.g.*, a more far-reaching European Convention on Human Rights? ⁴³ The crucial question which has arisen in connection with the E.E.C., and will almost certainly arise in connection with the supposed Human Rights Treaty, is whether or not subsequent national legislation contravening the Treaty would have *internal* validity. It seems to be equally open to national courts to hold their own contrary municipal law to be valid, leaving the government to answer for it internationally, or to hold it void. Further, if the international court were to hold it void when a national court holds otherwise, how is the decision of the former to be made effective, especially if the government concerned is defiant? ⁴⁴

The relation between any such set of supra-national regulations and British law poses difficulties, which the Government White Paper on entry into the E.E.C. glosses over.⁴⁵ The nearest parallel is the

³⁹ *e.g.*, the circumvention of the "entrenched clauses" of the South Africa Act 1909, by the Senate Act 1955, on which see *Collins v. Minister of the Interior*, 1957 (1) S.A. 552 (A.D.). The Russians have always derided reverence for constitutions as a "bourgeois fetish."

⁴⁰ *e.g.*, *Brown v. Board of Education* 347 U.S. 483 (1954). and the case of the "Pentagon Papers," *The Times*, 3 July 1971.

⁴¹ See, *e.g.*, the difficulties encountered in dealing with anti-social monopolies. For a different sort of situation, see Mr. Justice Black's opinion in the "Pentagon Papers" case (last note).

⁴² *Van Gend en Loos v. Nederlandse Belastingadministratie* [1963] C.M.L.R. 105.

⁴³ Generally, see the symposium, *Human Rights in National and International Law* (ed. A. H. Robertson, 1968).

⁴⁴ In *Costa v. E.N.E.L.* [1964] C.M.L.R. 425, the European Court did hold void a measure, which the Italian Constitutional Court had held to be valid. On this case, see T. J. Schoenbaum, "The Growth of Judicial Power in the European Economic Community" (1969) 48 N.Carolina L.R. 32; G. Bebr, "Law of the European Communities and Municipal Law" (1971) 34 M.L.R. 481.

⁴⁵ *Legal and Constitutional Implications of United Kingdom Membership of the European Communities* (1967) Cmnd. 3301. For the terms of admission: *The United Kingdom and the European Communities* (1971) Cmnd. 4715. On the implications generally, see E. Stein, "Towards Supremacy of Treaty—Constitution by Judicial Fiat: on the Margin of the *Costa* Case" (1964-65) 63

position of the United Kingdom Parliament with regard to the Dominions. The Statute of Westminster, 1931, section 4, declares that no Act of the British Parliament shall "extend, or be deemed to extend" to any Dominion except with its consent. Does this mean that Parliament "cannot" legislate except with consent (*i.e.*, is under a disability), or "can but will not"? There is, however, this difference from the E.E.C.-type situation. With regard to the Dominions the question is whether Britain, having surrendered her unfettered power to legislate, can now unilaterally resume her former power to legislate *for them*, whereas with regard to the E.E.C. the question is whether she can unilaterally resume exclusive power to legislate *for herself*. A British court *may*, as Viscount Sankey once remarked, treat the unilateral removal of the disability to legislate at will for the Dominions as being theoretically valid, though impractical since no such legislation or decision of British courts to that effect could affect Dominion subjects.⁴⁶ Alternatively, a court *may* treat the disability to be irremovable except with the assent of the Dominions.⁴⁷ So, too, in the E.E.C. context a unilateral resumption of exclusive legislative power by Parliament could be regarded by a British court as being not only theoretically valid, but also practicable, since any such legislation can be made effective in Britain. Or, as before, a court may equally well declare that the legislative power of Parliament has now been irrevocably curtailed. The difference between the Dominion and E.E.C. situations manifests itself, firstly, in the fact that the Statute of Westminster limits Parliament's power only indirectly by prescribing a special manner and form for Commonwealth legislation, whereas the Treaty of Rome imposes a direct limitation on legislative power without reference to manner and form. Secondly, the practical effect of the Statute of Westminster is that Britain has granted immunity from her unilateral legislative power to the

Mich.L.R. 491; J. D. B. Mitchell "What do you want to be inscrutable *for*, Marcia?" (1967) 5 C.M.L.R. 112; A. Martin, "The Accession of the United Kingdom to the European Communities: Jurisdictional Problems" (1968-69) 6 C.M.L.R. 7; N. M. Hunnings, "Constitutional Implications of Joining the Common Market," *ibid.*, p. 50; S. A. de Smith, "The Constitution and the Common Market: a Tentative Appraisal" (1971) 31 M.L.R. 597; *Britain and Commonwealth in Europe (Round Table Essays*, ed. M. Howard and R. Jackson, 1971). See also D. G. T. Williams's paper in this volume, "The Constitution of the United Kingdom," *ante*, at pp. 285-292.

⁴⁶ "Indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute; but that is theory and has no relation to realities": *British Coal Corporation v. R.* [1935] A.C. 500 at p. 520. A Dominion court would disagree: "Freedom once conferred cannot be revoked": *per* Stratford A.C.J. in *Ndlwana v. Hofmeyer N.O.* [1937] A.D. 229 at p. 237. Both sentiments find an echo in Lord Denning M.R.'s statement: "Freedom once given cannot be taken away. Legal theory must give way to practical politics": *Blackburn v. Att.-Gen.* [1971] 1 W.L.R. 1037 at p. 1040.

⁴⁷ Possible inference from *Danckwerts J. in Re Brassey's Settlement. Barclay's Bank, Ltd. v. Brassey* [1955] 1 W.L.R. 192 at p. 196.

Dominions whose subjects she is unable to coerce any longer on a change of heart, whereas by the Treaty of Rome she would grant some measure of immunity from her legislative power to her own subjects whom she can always coerce, if need be, into accepting a change in that position. Thirdly, the Statute of Westminster does no more than remove Britain's unilateral legislative power over Dominion subjects, whereas the Treaty of Rome would go further by conferring in addition to Britain's own power an overriding power over British subjects on the E.E.C. The problem may then be posed as follows: would the validity of the E.E.C.'s power over British subjects derive solely from the enabling Act of Parliament, or would it enjoy independent validity once it has been let in by the Act? The power of enforcement (coercion) might well be thought to have some bearing on this, and it certainly underlines the difference between the Dominion and E.E.C. situations from Britain's point of view.

Whether this difference in enforceability should be decisive depends on the judges. If enforceability is indeed crucial, then the Dominions must be said to enjoy a guaranteed immunity, in theory and in fact, from any unilateral exercise of legislative power by Britain, while the British people would have no such guarantee. But is enforceability the test? An effective coercive apparatus is undoubtedly an accompaniment of a legal system as a whole, but we are here concerned only with particular measures; and there are numerous particular rules which are "legal" without being enforceable.⁴⁸ On the other hand, Viscount Sankey's dictum that the unilateral renunciation of the Statute of Westminster by Britain could be regarded as theoretically valid by British courts may be construed as meaning only that the repealing Act would be valid in Britain, where it could be made effective, regardless of its validity in the Dominions. As against this, however, British courts have consistently treated the legislation of the British Parliament, which is admittedly unenforceable in Rhodesia, as valid *for Rhodesia*.⁴⁹ So enforceability cannot be decisive. Nevertheless, to say that an unenforceable provision may still be "law" is not to say that a duly enacted, enforceable provision (such as an Act resiling from the E.E.C.) could nonetheless be "not law," *i.e.*, invalid. As to this, in countries where there are written constitutions, duly passed and otherwise enforceable legislation is often held to be unconstitutional and void. Britain has no written constitution superior to her ordinary legislative processes. So the question whether Parliament's acceptance of an E.E.C.-type treaty is irrevocably binding on itself

⁴⁸ For illustrations from Roman and English Law, see my paper, "The Unenforceable Duty" (1959) 33 Tulane L.R. 473.

⁴⁹ *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645; *Adams v. Adams (Att.-Gen. intervening)* [1971] P. 188.

can only be answered, as stated before, by the judges.⁵⁰ If they do so hold, it would open up possibilities for an effective protection against abuse of power.

A feature common to all the methods of controlling power so far considered is the need for an independent judiciary. It is well known that the very nature of the judicial process makes it intrinsically impossible for any judge to apply rules mechanically. Leeways exist by virtue of the unprovided case, conceptual flexibility and the sheer imprecision of language.⁵¹ Judges indeed do their best to apply rules as they find them, but when the exercise of discretion becomes unavoidable this has to be guided by values. So judicial independence means independence of the values of those wielding power.⁵²

It is clear that a great deal of confidence has to be reposed in judges. Some doubt has been expressed because they are not elected and, as is also alleged, because they are thought to reflect only the values of a particular social class.⁵³ The answer to this sort of contention is that trust has to be reposed in someone. Even with elected representatives a vast amount of confidence is placed in them to do many things on which the electorate have not been, and cannot be, consulted. In any case, why are judges less trustworthy than elected representatives? Suspicions of political or class bias are grounded on very little evidence,⁵⁴ besides all such considerations need to be set against the unique training of judges in impersonal thinking and argumentation. The training of the Bar is the best there is to accustom a person to analyse and argue cases to the utmost of his ability, while keeping his own sympathies completely aside. Account should also be taken of the considerable pressure attaching to the judicial role as such, which exerts a moderating

⁵⁰ In *Blackburn v. Att.-Gen.* [1971] 1 W.L.R. 1037, the Court of Appeal left the point open (p. 1040) and declined to give an answer hypothetically. This case was considered in *Jenkins v. Att.-Gen.*, *The Times*, 14 August 1971.

⁵¹ "Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice: "Lord Wright, *Legal Essays and Addresses*, p. xxv. See also Lord Macmillan, *Law and Other Things*, p. 48; J. Stone, *Legal System and Lawyers' Reasonings* (1964), pp. 35-41, Chaps. 7-8.

⁵² H. L. Parker, "The Role of the Judge in the Preservation of Liberty" (1961) 35 *Austr.L.J.* 63; C. B. Salmon, "The Bench. The Last Bulwark of Individual Liberty" (1967) 117 *New L.J.* 749; R. O'Sullivan, "The Bond of Freedom" (1943) 6 *M.L.R.* 177 (maintaining that the triumph of the common (judge-made) law was the creation of the *liber homo*). Cf., Lewis J. in *Madzimbamuto v. Lardner-Burke* (first instance judgments reported in a Government Blue Book, GD/CIV/23/66) at p. 36. See also *Golak Nath v. State of Punjab* (1967) 2 *S.C.R.* 762; *Hassan and Rasul v. The State*, *loc. cit.*, *supra*, n. 33.

⁵³ e.g., D. N. Pritt, *Law, Class and Society* (1971); and see also the survey by P. O'Higgins and M. Partington, "Industrial Conflict: Judicial Attitudes" (1969) 32 *M.L.R.* 53.

⁵⁴ Cf., a concluding remark of O'Higgins and Partington, *op. cit.* at p. 58: "Clearly there was less statistical evidence of the influence of judicial bias than might *a priori* have been expected."

influence on personal prejudice and induces conformity with its standards of fairness and impartiality.⁵⁵

Even the most independent judiciary, however, will be helpless in the grip of a ruthless government.⁵⁶ Hitherto in Britain non-interference with judges has rested on convention, the working of which depends on "playing the game." But this is increasingly at risk in an age when "playing the game" tends to be derided as being "bourgeois" or "public school." Perhaps, the answer may be an international appellate court beyond the reach of state jurisdiction, rather like the European Court set up under the Treaty of Rome.

"*Breakdown*" basis. A radical solution to the problem of abuse of power is to obviate altogether the existence of large power-structures. Diametrically opposed to the solution which seeks to find a curb in an enlarged, supra-national body is that which would split up even existing states into small units.⁵⁷ The bigger the size, the bigger the problem; besides, bigness creates new, satellite problems of its own.⁵⁸ The seriousness of the abuse of power only arises when power-structures grow too big, which makes it absurd, so runs the argument, to seek a solution in making structures bigger still. Underlying this is an undoubted element of truth; bigness *does* create problems. Even with democracies, the larger the state the more oppressive does majority rule become, since the individual is swamped by parties and their overall programmes, which he can seldom, if ever, influence and which are vague enough to mean almost anything. Size also brings in its train such things as bureaucracy, automation and computers.

Although the basic hypothesis is true in some respects, it is questionable whether it justifies the sweeping contention that has been advanced. This paper is hardly the place to enter upon a detailed consideration of it, especially its economic feasibility. Suffice it to say that, as far as the present theme is concerned, the proposal is at most a conceivable way of tackling the problem, but it is a wholly unrealistic one. In the first place, power can never be eliminated, so the problem of preventing its abuse is ever present. It is admitted, for instance, that some overall co-ordination will have to be maintained, e.g., in transport, health, etc., and certainly in industry. The more vital the service that requires co-ordination, the more will power

⁵⁵ On the pressure of roles, see D. Emmett, *Rules, Roles and Relations* (1966) Chap. 7; generally, H. M. Johnson, *Sociology: a Systematic Introduction* (1961) *passim*.

⁵⁶ Cf., Thomas Hobbes: "... in the matter of government, when nothing else is turn'd up, Clubs are Trump": *Dialogue*, s.v. "Punishments," p. 140.

⁵⁷ Leopold Kohr, "The Breakdown of Great Britain," *52nd Conway Memorial Lecture* (1971). See also his *The Breakdown of Nations* (1957).

⁵⁸ Cf., Lord MacDermott, *op. cit.*, Chap. 7, on the "power of numbers."

tend to be concentrated in it. Moreover, it is not enough to break down a large unit into small units, however these may be determined⁵⁹; they will need to be *kept* small, and power will have to be used to counteract, on the one hand, the forces tending towards coalescence⁶⁰ and, on the other, those tending towards fragmentation to the point of chaos.⁶¹ Secondly, all states will have to break down together if anything is to come of the idea, but human nature being what it is, the whole plan seems idyllic in the extreme.⁶² In any case, large power-structures are with us, and until they can be made to disappear, ways must be sought to keep them in check.

⁵⁹ Two major weaknesses of the theory seem to be the vagueness of what is meant by "size" and "unit." Kohr does not mean numerical or geographical size, but "effective size," which is said to produce increased "velocity," i.e., "the speed at which (people) begin to move around." He instances the analogy of the panic-stricken rush of a cinema audience in the event of fire. But in South Africa, for example, the majority African population "move around" far more in relation to the minority white population. Why, then, are the latter "bigger" or more "effective"? If this is incorrect, it is not clear what he means. Further, what is a "unit"? Are minorities like the "alternative society" units to be hived off into self-contained groups? These particular people clearly do not want the responsibility of administering a state of their own; and it seems, from other parts of the lecture, that "unit," as opposed to "size," has a territorial connotation. If so, another difficulty arises. Some "units" have bigness built into them, which transcends even existing territorial divisions, e.g., religious (Moslem) or racial (Arab) unities. Kohr seems to regard "units" as fixed, but they are not. Different circumstances call into being different unities, e.g., Arab states as against Israel, but not *inter se*; and this fluidity makes even the division into existing states seem artificial and still smaller states more artificial. For another objection: Gibraltarians voted almost to a man to remain British. Would Kohr insist on their separation?

⁶⁰ Germany consisted of small units until the second half of the last century. German nationalism made the unification of Germany almost a crusade; cf., Friedrich von Savigny's thesis of the *Volksgeist*, in which also there is difficulty in deciding who the "Volk" are: *On the Vocation of our Age for Legislation and Jurisprudence* (2nd ed., transl. A. Hayward, 1831). Italy is another example, and there are many more. An economic example is the coalescence of the Ruhr coal and steel syndicates and of I. G. Farben when Allied power was finally withdrawn after the Second World War.

⁶¹ Just as there is a point beyond which bigness becomes "critical" (in Kohr's own words), so also there is a point beyond which smallness becomes "critical" too. Those who preach breakdown may find themselves hard put to arrest the momentum towards fragmentation. At what point should breakdown stop? It is easy to see why Kohr's thesis appeals to separatist nationalist movements. Unfortunately, fervent nationalism will drape itself with the respectability of any philosophy that supports it, however dubious, but which in the end may prove to be a shirt of Nessus. Kohr, who was a professor in Puerto Rico and then adviser to the secessionist movement in Anguilla, is now on the staff of the University College of Wales, Aberystwyth, and is a supporter of the *Plaid Cymru* movement. See his *Is Wales Viable?* (1971).

⁶² Unless all states do this, those that do not will find themselves exceeding the "critical" point of relative bigness, which will make them aggressors (on Kohr's analysis). The last plight of the broken down nations will then be worse than the first, for their fight for freedom from oppression will have to begin anew and from a point much further back. Apart from the few points alluded to in this paper, there are others in Kohr's lecture which, though containing a grain of truth, seem to be overstatements, notably his analysis of war and crime.

Control of Liberty

To prevent liberty of action from being abused, what is required is certainly not liberties for some at the expense of others, but equal liberties for all. But if equal liberty for all is not to degenerate into anarchy, there must be some restriction all round, in short no one should be free to abuse freedom. The crucial point, of course, is the criterion by which we decide what constitutes "abuse." In a social context this can only be determined with reference to social existence.

Control of liberty is to be achieved by inhibiting conduct, and the question now to be considered is how far law can be used to this end.⁶³ But first, some explanation is necessary as to what is signified by "control of liberty." Strictly, this seems to be a contradiction in terms. For where there is prohibition, there is no liberty, since to prohibit is to limit the very *existence* of liberty. So prohibition is perhaps better expressed in terms of "limitation" rather than "control" of liberty. The question of "control" concerns restraint in the *exercise* of liberty itself outside the area of prohibition.

With regard to prohibition, it is clear that liberty ends where duty begins, and *vice versa*. Although the phrases "liberty to do something" and "absence of duty not to do it" denote the same result, their surface connotations are different. Thus a régime, which forbids one to do anything save only those things that are expressly allowed, would be regarded as a most bullying power-structure, while a régime, which permits everything save only those things that are expressly forbidden, would be accounted liberal by contrast.

One task of the jurist is to work out the balance between legal duties and other forms of social control and to harmonise them. An important aspect of this concerns the relationship between legal prohibition and morality. In the recent Hart-Devlin controversy, Professor Hart, following John Stuart Mill, has argued that laws should not uphold morality as such, but should only prevent harm to others, and that there is a sphere of private morality with which law has no concern.⁶⁴ Lord Devlin has argued that "harm to others" is not a concept with definable boundaries, because what one does in private can and does have repercussions outside oneself.⁶⁵ The actions of every man are strands in a seamless web, and because of the

⁶³ The Conservative Party Political Centre document, *Public Order* (1970) speaks of "a synthesis of freedom and order. It is a notoriously difficult task, but it is necessary to try to achieve it as the basis for a satisfactory system of law in a democratic society."

⁶⁴ H. L. A. Hart, *Law, Liberty and Morality* (1963); J. S. Mill, *Utilitarianism, Liberty and Representative Government* (ed. A. D. Lindsay, 1910).

⁶⁵ P. Devlin, *The Enforcement of Morals* (1965), Chap. 1 and *passim*; see also B. G. Mitchell, *Morality and Religion in a Secular Society* (1967).

difficulty of marking out the boundaries of the influence of purely private actions, it is not possible to exclude these *a priori* as having no bearing on the problem. Nor can one meaningfully draw lines of demarcation between "private" and "public" spheres of morality, because the same action can have private or public significance depending, *e.g.*, on the individual concerned. Thus, a factory hand, who has an illegitimate baby, does not impinge upon the populace as does a public figure whose similar behaviour is more likely to be invoked as an example. Furthermore, should there not be some restriction on what a man may do with himself even though he does not interfere directly with others? Should a man, for instance, be free to make himself unfree? Mill, be it noted, the apostle of individualism and freedom and on whom Professor Hart relies so strongly, was quite emphatic that liberty does not imply this.⁶⁶ Professor Hart's own determination of "harm to others" by calling state "paternalism" in aid seems to be a disguised concession in Lord Devlin's direction, besides forcing him into some difficult positions. It has also been suggested that the difference between Professor Hart and Lord Devlin may stem from their unspoken premises—the former thinking of the minimum morality necessary for the continuation of any and every sort of society and the latter thinking of the morality necessary for the continuation of this or that particular society.⁶⁷

Assuming for the moment that laws should uphold certain moral positions by limiting liberties, it needs to be pointed out that this is only the beginning. For it is even more important to encourage a sense of obedience to those laws, which stems from acceptance of the standards behind them. This problem has two aspects, one of which is preserving acceptance of those standards and the other that of keeping them acceptable, which involves the problem of change.

Organised force is by no means the only, or even decisive, factor in securing obedience.⁶⁸ Acceptance of the underlying moral and social standards is more compelling.⁶⁹ The compatibility of a law with moral sense is a powerful inducement towards obedience. This is why resort to legal prohibition of behaviour may safely be kept to

⁶⁶ "The principle of freedom cannot require that he should be free not to be free": *op. cit.*, p. 158.

⁶⁷ B. G. Mitchell, *op. cit.*, Chap. 2, especially at p. 25. For a different analysis, see R. A. Samek, "The Enforcement of Morals. A Basic Re-examination in its Historical Setting" (1971) 49 Can.B.R. 188. See also Lord MacDermott, *op. cit.*, especially at pp. 8, 195.

⁶⁸ This was pointed out long ago by J. Bryce, *Studies in History and Jurisprudence* (1906), II, pp. 6 *et seq.*; K. Olivecrona, *Law as Fact* (1939), pp. 54, 60.

⁶⁹ This is the essential point in A. L. Goodhart's *English Law and the Moral Law* (1955). K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962), Chap. 18, points out that obedience is a matter of habit and practice; C. Fried, "Moral Causation" (1963-64) 77 Harv.L.R. 1258, distinguishes moral causation of obedience from psychological causation and moral persuasion.

a minimum as long as there is acceptance of the standards behind them, for the self-restraint which these inspire will check any abuse of the liberty allowed at law. It has been said with some degree of truth that forcing people to behave, or not to behave, in certain ways does not make them moral; it merely sets up taboos. But this is true only up to a point and attention needs also to be drawn to the countervailing influence: upholding certain laws not only points to the existence of certain standards but also helps to preserve them by acting as a brake on their abandonment. Even so pronounced a positivist as Professor Hart has declared that "*some shared morality is essential to the existence of any society.*"⁷⁰ Therefore, it is precisely when standards are being questioned that it becomes socially suicidal to relax laws simply because they are questioned or are difficult to enforce. This is *not* to argue that there should be no change; questioning is only the first wind of this. But to abolish legal restraints when moral restraints are already on the wane will end in destroying society, not changing it.

Upholding laws, therefore, helps to preserve a "moral atmosphere," which is essential to preserving that shared morality which in turn is essential to encouraging obedience and social existence. It gives heart to those who support standards and wish to conform. *Their* point of view should not be overlooked, for they, too, have a right to be heard, and this has been ignored for too long. Laws also set criteria by which non-conformity is acknowledged to be disobedience and illegal even by dissidents. Conformity must always be the norm; it is for non-conformists to justify themselves.⁷¹ This is most important, for to remove a sense of disobedience and illegality by removing the law is to remove a support of the social fabric. Besides, the standards behind law are the criteria by which the outside world judges a country, and no country can now live in isolation or afford to ignore world opinion altogether. The existence of laws is also helpful in persuasion and reform and in providing points of reference when weighing up the pros and cons of any proposed action. Indeed, upholding laws may even in time shape the ideas and *mores* of the community.⁷²

A commonly advanced reason for abolishing laws, especially those concerning moral standards, is that they have become difficult to

⁷⁰ *Law, Liberty and Morality*, p. 51. He appears to regard this as self-evident.

⁷¹ N. W. Poner, "Civil Disobedience: an Analysis and Rationale" (1968) 43 N.Y.U.L.R. 651. All the contributions to this issue of the *Review* are relevant. See also K. W. Wasserstrom, "The Obligation to Obey" in *Essays in Legal Philosophy*, p. 274.

⁷² K. Olivecrona, *op. cit.*, pp. 147-148. Centuries ago Plato and Aristotle taught that to rule is to educate, while the Soviet Union has been engaged in a gigantic effort to educate the masses for communism, *inter alia*, by means of law.

enforce (by which is here meant "detect and visit with sanctions"). This is a dangerous argument. Unenforceability in this sense is a matter of degree, and difficulty of enforcement, however great, should never be a ground *per se* for abolishing any law. As has been stated, fear of punishment plays only a minor part in ensuring obedience. The argument under consideration rests on the premise that only enforceable laws should be preserved. But enforceability is less significant in ensuring obedience than the psychological pressure towards conformity exerted by the fact of other people's conformity. Successful disobedience by one person does indeed relax the pressure to obey by setting an example to someone else to disobey in circumstances in which the first person would still have obeyed; and the more numerous the cases of disobedience, the weaker becomes that pressure. Even so, some residue of pressure always remains by virtue of the mere presence of something possessing the quality of "law," which casts on deviants the onus of justifying themselves. The danger of abolishing a law because it is unenforceable and is being disobeyed is that it weakens at one stroke the pressure to conform even to other hitherto enforceable laws; which is how laws once enforceable become unenforceable in time. In short, to talk of maintaining only enforceable laws is to take the first step towards undermining *their* enforceability.

Enforceability of a law depends on the observance of other laws giving effect to the penalty by the officials concerned. Once they are discouraged because of lack of interest in upholding laws, the practical foundation of law-enforcement as a whole is eroded.⁷³ Even if many violations of a law go undetected, it is important to deal firmly with cases that are detected. A large number of murders may go undetected, but that is clearly no argument for abolishing the law against murder.

Another argument is that the support of dissidents may be won back by removing laws against which there is widespread protest; otherwise the disobedience that is likely to ensue might bring all law into disrepute. This, too, is a dangerous argument, particularly when discontent threatens to be general. For in such a climate there has invariably been a prior loss of support for the standards involved independently of the laws reflecting them; criticism of the latter is only the consequence. Support for those same standards used to be forthcoming, often for generations, and in some cases along with more stringent laws than we now have. If, then, support for the standards has been lost independently of laws, abolition of the latter will not

⁷³ One recommendation in *Public Order* (Conservative Party Political Centre) is that the hotch-potch of laws relating to order should be simplified so as to help enforcement.

win back or preserve one jot of support even for what is left. Instead, the abolition will simply be accepted as of course and become a basis for demanding the relaxation of yet other standards and laws. It is important to remember that those loyal to standards and laws should not be betrayed. Removal of laws as a concession to dissidents is more likely to bring about the loss of *their* confidence and faith. The easing of laws and penalties on anti-social conduct may conceivably result in less freedom and safety for the law-abiding; and mere condemnation of such behaviour and words of sympathy with victims are never enough without firm action giving practical effect to such sentiments. The more law-abiding people lose confidence in the law and those in authority to protect them, the more will they be driven to the only alternative that is left, namely, to take matters into their own hands, the perils of which are unthinkable.⁷⁴ That day may be nearer than some liberally-minded philanthropists seem inclined to allow. Frightening thought!

So much for the problem of trying to preserve morality by using legal prohibition. Turning now to restraint in the exercise itself of liberty, as distinct from the abolition of liberty, the point of course is that such restraint must come voluntarily, or not at all. It derives from acceptance by the individual of standards other than those reinforced by legal duties, which makes it impossible to incorporate this factor in any formal concept of law. So the next problem is how law might be used to help in preserving the general acceptance of standards.⁷⁵

Such assistance can only be indirect. In the first place, the abandonment of some standards might be discouraged to some extent, perhaps not much, by attaching disabilities to certain activities. There is, for instance, disability at law to enforce immoral and illegal agreements.⁷⁶ But apart from this, two further possibilities of using law might be explored with reference to the religious propagation of moral standards and fostering a sense of liberty with responsibility.

An interesting speculation is how far, if at all, legal thinking may usefully be made available to religious teachers when formulating, or preferably re-formulating, their doctrines. Moral restraint used to be inculcated principally through religion, and as long as religion held sway, the law could hold back. Today religion is losing its grip. One

⁷⁴ L. C. Green, "Law and Morality in a Changing Society" (1970) 20 U.T.L.J. 422, 433.

⁷⁵ Aristotle insisted that one of the main functions of the state is to educate the citizen in virtue, and he deplored states which leave their subjects to do as they please: *Politics*, III, 9; *Ethics*, II, 1.5.

⁷⁶ The law can go even further. Thus, adult homosexuality in private is no longer prohibited, but advertisements for this purpose may be punished as a conspiracy to corrupt: *R. v. Knudler (Publishing, Printing and Promotions), Ltd. and Others* [1971] 3 W.L.R. 633.

likely reason is that most of its moral teaching is associated with assertions of happenings, which do appear to have been fashioned so as to appeal to a bygone age when people respected and wanted to believe in things that do not stand up to modern scepticism. Perhaps the root trouble is that the present-day, materialist obsession with "facts," elusive in themselves, has substituted a new kind of myth for the old with the result that the original function of myth has been lost. So far—and only in so far—as religious moral teaching still remains tied to apparent assertions of fact, the rejection of the latter carries with it the rejection of the former: the baby goes out with the bath-water. The somewhat severe legal approach to the evaluation of evidence might fruitfully be applied to an examination of the basis of "belief" as contrasted with "knowledge." Lawyers certainly are likely to profit from such an exercise.⁷⁷

Legal thinking could help far more by assigning a more acceptable role to these apparent assertions of fact, and might even restore the true function of myth. It is commonplace among lawyers that, notwithstanding all their procedures and rules of evidence, the "findings of fact" in a case are only approximations to what "really happened." No doubt, every court does its best to get as near to the "truth" as it can in order to mete out justice to the parties. But witnesses are fallible; they forget or lie, and many crucial matters are often not presented to the court. Over and beyond all this, the important feature of a judicial decision is its *ratio*, or principle, to be extracted from the case as a whole, for it is this that gets projected into the future and influences, in large measure or small, indefinite numbers of people. Contrasted with this controlling function of the principle, the truth or untruth of the facts as found is of quite minor importance.⁷⁸ Similarly, the truth-value of religious assertions of fact might be subordinated to the significance of the moral principles which transcend them. Statutory interpretation is a different sort of exercise and consists in playing variations in meaning of a given text. So, too, if certain religious texts ceased to be regarded as mere reports, this might open

⁷⁷ For the unpreparedness of lawyers to deal with questions of belief, see *U.S. v. Ballard* (1944) 322 U.S. 78, (1946) 329 U.S. 187, on appeal to the Supreme Court twice from 138 F. (2d) 540 and 152 F. (2d) 941 (concerning Guy Ballard's belief that he had, *inter alia*, talked and shaken hands with Jesus Christ in San Francisco).

⁷⁸ Thus, the ruling in the greatest tort case of the century, *Donoghue v. Stevenson* [1932] A.C. 562, was founded on the "fact" that a dead snail had floated out with the contents of a ginger-beer bottle being consumed by a customer. This crucial "fact" was never actually established and its truth is still in doubt: cf. Jenkins L.J. in *Adler v. Dickson and Another* [1954] 1 W.L.R. 1482 at p. 1483, on which see R. F. V. Heuston, "Donoghue v. Stevenson in Retrospect" (1957) 20 M.L.R. at p. 2. But its truth or untruth is of no consequence; it is the principle on which the case was decided that has proved to be epoch-making, since it affects the daily lives of people more closely than any other tort principle.

up richer possibilities for their interpretation.⁷⁹ These two techniques, that of case-law and statutory interpretation, suggest means whereby the valuable moral teaching of religion might be cut loose from the wreckage of dogma and be allowed to float, so to speak, on more buoyant supports.⁸⁰

The second problem is the promotion of a sense of liberty with responsibility.⁸¹ At present too much emphasis is placed on rights and too little on duties. Law *serves* society; it should, therefore, help to ascribe primacy to duties rather than to rights.⁸² The welfare state has done much to foster this insistence on rights. The contention here is *not* that welfare services are bad, but that they can have undesirable side-effects unless there is a corresponding emphasis on what people owe to society in return for the benefits they receive. No one likes to feel indebted and grateful. Instead, the reaction is to persuade oneself that welfare benefits are only due "as of right" and to keep casting around for other grievances. So develops the attitude of demanding more and more in return for less and less and towards the situation aptly expressed by Oliver Goldsmith, "where wealth accumulates and men decay."⁸³ How a sense of responsibility is to be instilled through law involves delicate questions of policy.⁸⁴ Perhaps, something might be done by withholding welfare benefits from those who strike at society; but what constitutes "striking at society" and who decides this need to be worked out with the utmost care. Industrial action by workers and unions is a sphere of activity that springs immediately to mind and is a peculiarly sensitive one.

⁷⁹ The problem is one of hermeneutics. Its investigation in relation to law is long standing: e.g., F. Lieber, *Legal and Political Hermeneutics* (1880). In the last few years a Cambridge discussion group sought to bring together scientific, historical, literary, psychiatric, philosophical, religious and legal methods of thinking on the question of interpretation. It is hoped that a symposium of essays will result.

⁸⁰ Some Christian teachers today do not regard the historicity of certain events, hitherto thought to be fundamental, as being essential: E. W. Barnes, *The Rise of Christianity* (1947); J. Robinson, *Honest to God* (1963); D. E. Ninham, *Saint Mark* (1963).

⁸¹ See, on this problem, W. G. Cole, "Private Morality and Public Law" (1968) 54 *Am.B.A.J.* 158; E. F. Morris, "American Society and the Rebirth of Civil Obedience," *ibid.*, p. 653.

⁸² This was so in ancient Jewish theory and is central to the theory of Leon Duguit, e.g., *Law in the Modern State* (transl. F. and H. J. Laski, 1921). Some of those who currently produce pornography assert liberty to indoctrinate children with their views. They are no doubt sincere in what is to them a crusade. But (a) it is curious that they are also foremost in opposing indoctrination of children with religion before they can think for themselves. Besides, (b) indoctrination is not a bad thing as such; it depends on what is taught. Religious indoctrination at least teaches service and duty to others; the pornographic style of indoctrination teaches self-indulgence. From a social point of view, therefore, the former is tolerable, the latter is not.

⁸³ *The Deserted Village*.

⁸⁴ J. Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy. A Symposium* (ed. S. Hook, 1964), Chap. A. For difficulties and problems, see the other contributions in Part I.

Nowadays the inter-dependence of people in society is such that whole sections of the nation, sometimes the nation itself, can be stricken into impotence by one group or other taking strike action.⁸⁵ As long as freedom to do this sort of thing is neither limited nor controlled, the law would appear to condone a form of blackmail, especially when such action is calculated to coincide with occasions when maximum hardship and inconvenience can be inflicted on countless numbers of people, who are in no way responsible for or involved in the disputes.⁸⁶ In another sphere, that of crime, criminals might be made to do social work as reparation in proportion to their offences; but this may not win favour with trade unions.⁸⁷

Popular psychology has spread the idea that deviant behaviour is the result, not of the delinquent's moral shortcoming, but of the failure of others (parents, environment, etc.). The incessant barrage along this line through the mass media does not help with the problem of instilling a sense of responsibility, if it does not actually hinder. The broad proposition has some truth, but it has come to be regarded as if it represents the whole truth; which it does not. For, logically, if the failure of the present generation is attributable to the past, then the failure of the next generation must be attributable to the present. In short, to foist responsibility away from oneself and onto others in the past, is to accept responsibility now for others in the future.

It is the latter aspect of this proposition that needs to be put across, since as soon as a person can be made to appreciate the responsibility of others and of circumstances for what he is, that is precisely the moment at which he has become capable of appreciating his own responsibilities. The present-day tendency, however, is such that there is no lack of persons to raise an outcry against any show of firmness in dealing with trouble-makers, or potential trouble-makers, at any rate on those occasions that achieve publicity.⁸⁸ The conse-

⁸⁵ Cf. Duguit's doctrine of "social solidarity": *op. cit.* For the problem, see Lord MacDermott, *op. cit.*, Chap. 7.

⁸⁶ In *Collymore v. Att.-Gen. of Trinidad and Tobago* [1969] 2 All E.R. 1207, the Privy Council held that the liberty of association was not impaired by limiting the liberty to strike.

⁸⁷ J. D. McClean, "Reparation by the Offender" (1971) 34 M.L.R. 436. Trade unions are anxious to secure themselves against legal control of the exercise of their powers and liberties. If they were to achieve this, the only restraint would be their sense of social responsibility. The way this has worked in recent years is interesting.

⁸⁸ Examples: the Editorial in *The Law Guardian*, July/August 1970 (No. 61) protesting against the conduct of the judge in the *Garden House Riot* case; G. Drewry, "Freedom and Order" (1970) 120 New L.J. 1142, criticising *Public Order* (pamphlet of the Conservative Party Political Centre) on the ground that there ought to have been prior "agreement about basic definitions"; B. A. Hepple, "Aliens and Administrative Justice: the *Dutschke Case*" (1971) 34 M.L.R. 501, criticising the deportation of Rudi Dutschke. How do any of these help to deal with future situations in the present climate? Neither casuistry nor legalistic arguments derived from the analysis of bygone incidents take account of the fact that in the days

quences of this are incalculable: it discourages the law-abiding, it undermines law-enforcement and, worst of all, minimises the chance of inculcating any sense of responsibility.

Psychologists and psychiatrists will probably admit that their subjects are still in their infancy, for they have not yet evolved the wherewithal by which they can know when their theories are wrong.⁸⁹ There is seldom any difficulty in weaving plausible theories in these subjects; the difficulty lies in testing them. A sense of social responsibility is certainly not promoted by plunging into penal reform on such hypotheses or by ameliorating punishments without at least substituting some sort of compulsory service by wrongdoers either to society or to their victims. Be kind by all means, but not at the expense of standards. To be merciful to a wrongdoer is one thing; to carry that to the point of refusing to see any wrongness in the doing is quite another. It is as foolish to have a sense of compassion without a sense of social responsibility as it is to have no sense of compassion at all.

The root trouble is that there is now greater distrust and lack of confidence in authority than used to be the case. So obsessed are certain people with the perils of the abuse of power that they are blind to the perils of the abuse of liberty. To advocate liberty as such is to adopt a negative and suicidal attitude. The gist of liberty, as has been pointed out, is the *absence* of duty, which is negative. However much its champions may believe that they are taking up a positive stand, they are not mindful of what people actually do with their liberties, but are far more concerned to see that there shall be fewer and fewer limitations and controls, or even none at all. Added to this is that other point that the doom of liberty itself lies at the end of the road of unlimited, uncontrolled liberty. A more positive and constructive attitude would be to concentrate on duty, on basic obligations to society, and to work outwards from these towards liberties. *Some* exercise of power there must be to prohibit certain forms of liberty, and a sense of values and standards will help to keep in perspective the dangers of the misuse of both power and liberty.⁹⁰

when the British "rule of law" gave sanctuary to Marx, Engels, Kropotkin and others, it was operating in a vastly different social, political and world arena from that of today.

⁸⁹ For an apt statement of this with regard to sociology, see W. J. H. Sprott, *Sociology* (1966) p. 39.

⁹⁰ For Lord MacDermott the preservation of public order effectually "is a first task;" *op. cit.*, p. 7. For moral quality in law, see *ibid.*, pp. 8, 195. A. L. Goodhart, "Freedom under the Law" (1960) 1 Tasm.L.R. 375, shows how legal control came to be thought of as necessary to freedom. See also E. F. Carritt, "Liberty and Equality" (1940) 56 L.Q.R. 61; R. L. Hale, "Freedom Through Law" (1954) 54 Col.L.R. 70. On the need to uphold authority for the sake of human freedoms, see J. Humphrey, "Human Rights and Authority" (1970) 20 U.T.L.J. 412.

The absence of such a sense is all the sadder since critics of authority are usually so well meaning.

Need for Change

Change in law is necessary to keep abreast of social evolution. Just as the consonance of a law with morality is an inducement to obey it, so also when moral ideas change tension arises between rule and behaviour and there is then an inducement to disobey. The issue, therefore, is not that of change or no change, but of the direction and speed of change. Disobedience by way of protest is not revolution, and so far as it stops short of anarchy it implies a willingness to abide by a better law or system. Therefore, careful consideration needs to be given to this problem since failure to change may constitute an abuse of power.

One cause of discontent should be mentioned and disposed of because it is not rooted in any sort of abuse, but in the fact that the values of a minority happen to be so opposed to those of the rest of society that the mere existence of society builds up in them a sense of oppression. Normally the solution of differences in values and opinions is democracy in which there can be a periodic change of government. But to an uncompromising minority, e.g., the "alternative society" or racial group, all other parties are "establishment" because their own values run counter to everyone else's. Then even democracy takes on the appearance of a monolith of power. Worse: any action taken against them in accordance with the laws of society tends to be condemned as "political."⁹¹ So far as any group exhibits social sense and preaches responsibility among other things, it will have to persuade sufficient people in order to become a majority. So far as it is concerned only with self-indulgence, then in a social context it contributes nothing to the point. If ever such a group of people establish a community of their own, the conditions essential to social continuity will force them into a sense of responsibility (which is why the "alternative society" can only exist as a minority). If their aim is to do away with society altogether, the resulting chaos will inevitably end in a return to power.

Change in law is of two sorts: the instant introduction or abolition of whole doctrines, which is a task for the legislature, and the day-to-day adjustment of matters of detail, which is a task for the judiciary. If the power of legislators to change or not to change laws is not to become an abuse of power, then the standards and values behind them must not be regarded as inflexible. It has to be acknowledged that

⁹¹ As the judges were accused after the Garden House Riot in 1970 and after the trial at first instance of the producers of the *Oz* magazine in 1971 (appeals allowed in part, *R. v. Anderson and Others* [1971] 3 W.L.R. 939.

everyone, minorities and individuals, have a claim to be heard and to have, as far as possible, reasoned answers to their contentions. Change in law must come after full and enlightened consideration of every point of view.⁹² Inability to secure a hearing can produce more frustration than anything else. It may be remarked here that the smaller the group, the more chance there is for each member to make himself heard; and in this respect the previously considered breakdown of nations into small units would have at least this merit to commend it. But, as pointed out, breakdown itself and the new groupings are complex matters to which no simple solutions can be offered.⁹³

On the other hand, the opportunity for the detailed adjustment of legal machinery by judges lies in the very texture of laws, since it is the structure of legal equipment, *i.e.*, concepts, that makes this possible. Concepts are the instruments by which behaviour and the exercise of power and liberty are ultimately judged; and it is the task of the jurist to keep them flexible and adapted to varying contemporary needs.

Conclusion

A contented society is the antithesis of both tyranny (abuse of power) and anarchy (abuse of liberty). The total separation of law from values can have a baneful effect, since a purely formal concept, indifferent to the conditions essential to social and legal continuity, is quite inadequate to cope with the problems that arise. Power is manifested in what is actually accomplished by means of particular laws, while liberty is manifested by what is left untouched by legal prohibition. It is not impossible, despite the sort of difficulties that have been considered, for control of power to be built into the criterion of validity and in this way such control could still be accommodated within a formal concept of law. The caution must still be uttered, however, that formalism without more is equally consistent with abuse of power. So what is needed is a concept which would exclude the possibility of abuse *ab initio*, for which purpose it will have to transcend pure formalism.

With regard to liberty the position is different. Liberties themselves can always be replaced by contrary duties. But control of the exercise itself of liberty can only be influenced very indirectly through law. A formal concept is manifestly useless for this latter purpose. The question: what other sort of concept would serve, should be considered alongside the choice between an "open" or "closed" concept of law. The former admits of "gaps" in the law in any

⁹² Cf., Lord Devlin, *op. cit.*, p. 15 and Preface, pp. viii-ix.

⁹³ *Supra*, n. 59.

area uncovered by specific legal regulation. Some liberties may of course result from the specific abolition of duties, or there might conceivably be a general rule to the effect that whatever is not prohibited is deemed to be permitted. But apart from these two possibilities, the first of which is, in any case, limited in scope and the second wholly speculative, an "open" concept of law leaves liberty as an extra-legal phenomenon.

On the other hand, in a "closed" concept "law" is wider than specific regulation.⁹⁴ Duty and liberty are as two sides of the same coin. There is no logical necessity leading to one concept rather than the other; it is a matter of choice depending on which is more suitable.⁹⁵ The argument of this paper obviously requires a teleological concept. If control of the exercise of liberty is essential to the continuity of law and society, then liberty itself must fall within the concept of law, and for this purpose a "closed" concept would be more appropriate. Emphasis will also have to be placed on "law" as a continuing activity so as to include its formal machinery as well as the influences on and resulting from its functioning. The justification for so doing is that "law" in the sense of "legal system" is a continuing phenomenon and nothing else. The position, then, is that control of the exercise of liberty must come through attitudes induced in people; limits on the very existence of other liberties must come through duties, which are dependent on the exercise of power; while control of power must come through the attachment of disabilities.

This paper may appear to some as an argument for the preservation of the *status quo*. More appropriately, it might be described as a plea for evolution rather than revolution. It discusses some of the conditions necessary for the orderly development of any society; and even if the present order were smashed to pieces and a new order established, the conditions necessary for the peaceful development of that will remain the same. This is no plea for any particular set of political values. If there is such a thing as a death-wish of societies, then extreme dictatorship and extreme permissiveness are two such wishes; and the past fifty years have seen countries sliding down one slope or the other. What has been said here is not new, indeed, it would be very strange if it were. Some old, old lessons need to be restated and relearned if there is to be any worthwhile society by the end of the next fifty years.

⁹⁴ The question has arisen chiefly in international law: see, e.g., G. Radbruch, *Legal Philosophy in 20th Century Legal Philosophy Series*, IV (transl. K. Wilk, 1950), pp. 212 *et seq.*; *contra*, S. Romano, *L'Ordinamento Giuridico* (2nd ed. 1946), pp. 205 *et seq.*

⁹⁵ As pointed out by Stone, *op. cit.*, pp. 190-192.

NOTES

General

From 1921 until 1953 the *Cambridge Law Journal* was published once a year, each three successive yearly issues forming one volume. Beginning with 1954 the number of issues was increased to two per year, the two issues of any one year forming one volume. The volumes from 1921 to 1953 are numbered 1 to 11. The volumes from 1954 to 1967 have no volume numbers but are marked with the year only. The volumes from 1968 onwards (Vol. 26) are marked with both year and volume number. Two volumes are being published in 1972, namely, Volume 30 (1972 A) which is the regular volume for the year and Volume 31 (1972 B) which is the Jubilee volume consisting of the Jubilee issue (Vol. 31, pt. 1) and the present Index (Vol. 31, pt. 2). The present Index covers Volumes 1 to 28 (1921-70) and the Jubilee issue (1972 B).

References in this Index are to volume and page numbers throughout. A table has therefore been included to convert volume numbers into years to facilitate the finding of references in those volumes which are marked with the year only. The first eleven volumes contain a large number of case notes, contributed mainly by undergraduates and signed with initials only. The volumes from 1954 (Vol. 12 onwards) contain fewer case notes. These are much longer, contributed mainly by teaching members of the Faculty, and signed with their names.

The different treatment of the two groups of case notes will be explained below.

Author index

The author index contains entries for all persons who have either contributed at least one article in any volume or one note from Volume 12 onwards, or who have contributed at least one note in the first eleven volumes and subsequently become teaching members of the Faculty of Law of the University of Cambridge. Initials have been used rather than Christian names except where the fuller form either aids identification or is known to be preferred by the author. Names appear in their latest form, *e.g.*, Lord McNair, Sir Rodger Winn.

Under each author, contributions are listed in three sequences, as far as applicable:

- (1) the titles of articles and long notes (five pages or over) in any volume, followed by references to the initial and final pages;
- (2) the titles or headings of short notes in any volume, giving references to initial pages only;
- (3) references only to all book reviews.

Persons who have only contributed notes in the first eleven volumes are not listed in the author index unless they have subsequently become teaching members of the Faculty. It follows that notes in these volumes are, in general, listed only if written by contributors of articles or post-1953 notes. Since pre-1954 notes are, in general signed with initials only, mistakes may well have occurred in attribution to authors.

Subject index

The subject headings are printed in alphabetical order. In order to facilitate finding the appropriate heading, classified and alphabetical lists are provided. In the classified list, all subject headings are grouped under subject areas, *e.g.*, Contract, Equity, International Law, and, where appropriate, the same subject heading appears in more than one group.

Headings under which a large number of items would have to be listed have been subdivided in such a way that those subheadings which would require many references have been turned into separate headings, *e.g.*, articles on marriage law appear under the heading "Marriage" and not under the heading "Family Law." Entries for topics on which there is little material, *e.g.*, relations between parents and children, appear usually under the wider heading, *e.g.*, "Family Law."

Under each heading, all articles and notes from any volumes are listed with volume and page references. Book reviews are not included. There may be more than one entry for one item. Most entries begin with a phrase which indicates the aspect of the subject dealt with in the article or note. This phrase is taken, as far as possible, from the title of the article or the title or heading of the note in question. These phrases appear in alphabetical order.

Each phrase is followed by an identification of the author. This is usually given in the form in which it appears in the actual volume, but initials have been expanded where the full name is known (*e.g.*, C. R. N. W. becomes Sir Rodger Winn), and earlier forms of names have been replaced by later ones, *e.g.*, A. D. McNair becomes Lord McNair. For the reasons given in the note on the author index, mistakes may have occurred in expanding initials.

Where an article or a note deals with the subject in question in general and not only with one aspect of it, the phrase with which entries generally begin is omitted and the identification of the author and the volume and page reference follow immediately after the subject heading.

Entries for articles and long notes (five pages or over) show first and last pages, those for short notes, first pages only.

Geographical index

The geographical index lists in alphabetical order all jurisdictions the law of which has been the subject of articles or notes. Under the name of each jurisdiction, entries for all relevant items. These duplicate entries in the subject index.

Table of cases annotated

This table lists all cases which have formed the subject of at least one note in any of the volumes indexed, or to which an article was devoted. For cases decided by the courts of jurisdictions other than England, the name of the jurisdiction forms part of the entry. For this purpose, all cases decided by the House of Lords or by the Judicial Committee of the Privy Council are considered English cases.

Where the names of the parties to a case have changed on appeal (this does not apply to appeals to the Privy Council from overseas), this is indicated as follows: (a) if the case has been annotated in the lower courts and on appeal, the original name of the case is listed, followed by "on appeal" and the name of the case on appeal in square brackets and then the reference to the note which relates to the case in the lower courts. The name of the case on appeal is listed separately in its place in the table, followed by "appeal from" and the name of the case in the lower courts in square brackets, and then by the reference to the note which relates to the case on appeal; (b) Where a case has been annotated on appeal only, the entries are similar except that no reference appears opposite the entry under the original name; (c) conversely where a case has been annotated in the lower courts only (a more unusual occurrence), no reference appears opposite the entry under the name of the case on appeal.

The years given are generally those in which the cases were reported in the series of reports used by the commentators; not all series report the same case in the same year, and discrepancies between the years shown in the present table and in other tables of cases may, therefore, occur.

Table of statutes and Order in Council annotated

This table lists, in alphabetical order, all Acts of Parliament and the one Order in Council which have formed the subject of annotations.

Table of international conventions annotated

This table lists the conventions which have formed the subject of annotations.

Table of reports of committees, etc. annotated

This table lists, in alphabetical order, all those committees, reports of which have formed the subject of annotations. Under the name of each committee entries will be found for all reports which have been annotated. The table also lists a few government publications other than committee reports which have been annotated.

Table of Command Papers annotated

This table lists in numerical order all Command Papers which have formed the subject of annotations. They are largely identical with the items listed in the immediately preceding table.

W. A. F. P. S.

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